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10

No. 88-928-CFX
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Title: James M. White, etc., Petitioner
v.
United States, et al.

Docketed:
December 3, 1988

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Payment,Kenneth A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 3 1988	G	Petition for writ of certiorari filed.
2	Dec 3 1988		Appendix of petitioner James White, etc. filed.
4	Jan 3 1989		Brief amici curiae of New York State Bar Association, et al. filed.
5	Jan 3 1989		Order extending time to file response to petition until February 4, 1989.
7	Feb 1 1989		Brief of respondents United States, et al. in opposition filed.
8	Feb 8 1989		DISTRIBUTED. February 24, 1989
9	Feb 27 1989		Petition GRANTED.
			**
11	Mar 17 1989		Order extending time to file brief of petitioner on the merits until April 27, 1989.
12	Mar 17 1989		Joint appendix filed.
13	Apr 26 1989		Brief amici curiae of New York State Bar Association, et al. filed.
14	Apr 26 1989		Brief of petitioner James White, etc. filed.
16	May 26 1989		Order extending time to file brief of respondent on the merits until June 20, 1989.
17	Jun 20 1989		Brief of respondent United States filed.
18	Jul 12 1989		CIRCULATED.
19	Jul 20 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 3, 1989. (2ND CASE)
20	Jul 20 1989	X	Reply brief of petitioner James White, etc. filed.
21	Sep 22 1989		Record filed.
		*	Certified copy of original record and proceedings received.
22	Oct 3 1989		ARGUED.

1 pp

PETITION FOR WRIT OF CERTIORARI

88-928 (1)

In The

Supreme Court of the United States

October Term, 1988

JAMES M. WHITE, as attorney for and as the Executor of the Estate of Helen P. Smith, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA and JAMES M. SERLING, Estate Tax Attorney, Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

May the factual determination of a state court of original jurisdiction, awarding attorneys' fees in an estate matter in accordance with well-settled decisions of the state's highest court, be collaterally attacked by the Internal Revenue Service in federal audit proceedings?

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the Court of Appeals (reproduced at Appendix A-1) (hereinafter "A.") is reported at 853 F.2d 107 (2d Cir. 1988). The opinion of the District Court (A. 26) is reported at 650 F. Supp. 904 (W.D.N.Y. 1987).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 2, 1988. (A. 1) An order denying Petitioner White's Petition for Rehearing in banc was dated and entered on October

6, 1988. (A. 45) Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The following constitutional provisions, statutes, and regulations are involved in this petition:

1. *Internal Revenue Code § 2053(a):*

§ 2053. Expenses, indebtedness, and taxes

(a) General rule.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

(1) for funeral expenses

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortgages . . . ,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

2. *Internal Revenue Code § 7602(a)*

§ 7602. Examination of books and witnesses

(a) Authority to summon, etc.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

3. *Constitution of the State of New York art. 6, § 12(d):*

§ 12.

. . . .

d. The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.

4. *New York Surrogate's Court Procedure Act § 201(3):*

§ 201. General jurisdiction of the surrogate's court

. . . .

3. The court shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all ques-

tions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party and any other person having any claim or interest therein, over whom jurisdiction has been obtained as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

STATEMENT OF THE CASE

Introduction

This case presents to this Court for the first time an issue that now divides the Circuit Courts of Appeal. To be resolved is the degree of deference owed by federal tax authorities to determinations by state courts in matters within their particular province.

A state probate court has made an award of attorneys' fees for services rendered on behalf of an executor. The legal standards governing this award have long been settled by the state's highest court. The probate court had only to exercise its discretion under these standards based on the facts presented to it. Reasonable attorneys' fees for an executor, as administrative expenses "allowable" by the law of the State, are deductible under section 2053(a) of the Internal Revenue Code.

Notwithstanding the probate court decree, the Internal Revenue Service seeks in this case to make a collateral attack on the fee amount awarded in the discretion of the probate court and to relitigate the issue in federal court. The Second Circuit Court of Appeals has now sanctioned the avalanche of new federal litigation portended by the Service's position. The Sixth and Seventh Circuit Courts of Appeals have previously reached contrary rulings.

How the case arose

The case arose because a Rochester, New York lawyer, petitioner James M. White, believed that Internal Revenue Service auditors had no legitimate reason to subpoena his file and time records for an estate he had represented. The district court agreed with attorney White, but the Second Circuit Court of Appeals reversed and ordered that the IRS summonses be enforced.

The late Helen P. Smith, who lived in Monroe County, State of New York, died in November, 1982, leaving an estate of approximately $450,000. Petitioner White, an experienced general practitioner, was retained as both executor and attorney for the Estate.

Within a month after Mrs. Smith's death, attorney White obtained a decree of probate from the Monroe County Surrogate. The decree was based on a petition he had filed to probate her Will and First Codicil, affidavits of attesting witnesses, and waivers and consents from four out-of-state distributees. White then collected the assets of the Estate, which included numerous securities and cash accounts. Among other tasks, he paid various cash legacies and distributed moneys to a dozen residuary legatees. He caused the Estate to make a timely alternate valuation election and prepared and filed federal and state estate tax returns.

On July 17, 1984, after preparing and submitting a detailed accounting, White obtained a decree of judicial settlement from Monroe County Surrogate Arnold F. Ciaccio. The decree included an express direction that attorney White be paid the statutory fee as executor of the Estate and that he receive the sum of $16,800 for legal services rendered "for the benefit of the Estate." Each of the twelve residuary legatees had received a copy

of the accounting, which had specifically requested the fee, and each legatee had consented in writing to payment of the requested fee.

The Surrogate Court in New York State, like its sister probate courts in many other state systems, is a specialized court whose principal role is to oversee the administration of local estates. N.Y. Constitution art. 6, § 12(d); N.Y. Sur. Ct. Proc. Act § 201(3). More than any other lawyer or judicial officer, the local Surrogate knows the role of local lawyers in estate practice. From his experience and from reviewing the documents filed in Surrogate Court, a Surrogate Judge can assess the responsibility assumed by an attorney for an estate of this size and complexity, the steps needed to be taken, and the time they require. He can also see whether the attorney carried out those responsibilities promptly and effectively. Finally, because he must approve attorneys' fees for every Monroe County estate where judicial settlement is sought, a Surrogate Judge is familiar with local community practice regarding attorneys' fees for services rendered in estate matters.

The tax return for the Smith estate listed deductions for the executor's fee and the attorney's fee as approved by the Monroe County Surrogate. The documents on file with the Surrogate Court verified that the fees had actually been awarded and paid to attorney White.

Several months later, the Internal Revenue Service undertook an audit of the Smith estate tax return. In the course of the audit, the Service wrote to White demanding documentation of the basis for the executor's and attorney's fees taken as deductions. The Service wanted to review the reasonableness of the fee amount approved by the Surrogate, and to do so it demanded his time records of work on the estate. In the alternative, the Service demanded a list of acts performed for the Smith estate, time spent on each task, and hourly rates.

It was apparent to White that, notwithstanding the Surrogate's decree, the Service intended to decide for itself what his services as a lawyer for the Estate were worth, based primarily on his timesheets, and to limit the estate tax deduction accordingly. As he saw it, however, his time records and hourly rates did not bear on the reasonableness of his fee under New York law; in any case, the only issue that could possibly concern the Service was whether his fee had been approved under New York law by the Monroe County Surrogate.

White supported his position by obtaining a February 25, 1985 letter from the Surrogate Court that addressed the question of the attorney's fee in the Smith estate (A. 53). The Surrogate's letter stated:

> This is to advise that the fee set is in keeping with our ordinary and customary guidelines which have been followed in this Court for several years. Moreover, it conforms to the criteria established by the Court of Appeals in Matter of Freeman, 34 N.Y.2d 1 and in Matter of Potts, 241 N.Y. 593. . . . In conclusion, I state to you that a re-review of the file and account submitted justify in every respect both the commission and the fee approval. These are not done in an arbitrary fashion but rather as indicated following the application of various criteria.

The Service was unpersuaded. White was served with two IRS summonses demanding the previously requested records. (A. 46, 50) White appeared in person and later by a representative, but respectfully declined to comply. The Service eventually disallowed the attorney's fee deduction in the Smith estate in its entirety and assessed a deficiency.

Decisions of the District Court and Court of Appeals

In the meantime, the Service commenced a proceeding in United States District Court to enforce its summonses. The matter came before Hon. Michael A. Telesca, U.S.D.J. (who had

served as Monroe County Surrogate Judge himself for many years until he was appointed to the federal bench).

The district judge issued a considered Decision and Order in which he declined to enforce the summonses. He ruled that the Service's objective of making an independent determination of the reasonableness of the executor's fee and the attorney's fee awarded to White was not a proper purpose. He held that the IRS was bound to accept the determination of a state probate court which had applied state law as pronounced by the state's highest court. In the district court's view, the Service's position that it could collaterally review a Surrogate Court determination violated principles of federalism. 650 F. Supp. 904 (W.D.N.Y. 1987) (A. 26).

The Second Circuit Court of Appeals reversed and directed that the summonses be enforced. In the court's view, the Service had made a prima facie case for enforcement merely by alleging in a conclusory affidavit that the purpose of its investigation was to determine the tax liability of the Smith Estate, that it needed the subpoenaed books and records for that purpose, and that it did not already have them.

The court rejected the argument that enforcement was nevertheless improper because there was no valid purpose for these particular summonses. The court held that the decree of the Surrogate alone did not establish the deductibility of the Estate's attorney's fee under section 2053(a) of the Internal Revenue Code. Furthermore, the court interpreted *Commissioner v. Estate of Bosch*, 387 U.S. 456, 18 L. Ed. 2d 886 (1967), to entitle the Service to make "an independent assessment" of the validity of the attorney's fee under state law, since the Surrogate's decree came from a mere trial-level court, not from New York's highest court.

Finally, the Court of Appeals found no danger that collateral review by the Service of the fee amount approved by the Surrogate would cast disrespect on the considered judgment of a state court. 853 F.2d 107 (2d Cir. 1988) (A. 1).

REASONS FOR GRANTING THE PETITION

A. *The Decision of the Court Below Conflicts With Decisions in Other Circuits Regarding the Conclusiveness of a Probate Court Decree Under I.R.C. Section 2053(a).*

The key issue in this case is whether the Service was bound under section 2053(a) of the Internal Revenue Code to accept the state court's determination as to the amount of a reasonable attorney's fee, or whether the Service was free to determine a reasonable fee independently. The decision of the Second Circuit Court of Appeals conflicts with prior Sixth and Seventh Circuit decisions of the Sixth Circuit and district court decisions in the Ninth Circuit.

Section 2053(a) entitles an estate to deduct amounts for administrative expenses "as are allowable by the laws of the jurisdiction . . . under which the estate is being administered." The Service's — and now the Second Circuit's — position agrees with the approach of the Sixth and Seventh Circuits and petitioner in holding that deductibility depends on the application of state law. These courts differ sharply, however, on the issue of *who* is to apply state law. The Sixth and Seventh Circuits hold that an expense is "allowable by the laws of the jurisdiction" if *a court in that jurisdiction* has so ruled, applying state law. But the Second Circuit has now held that the statute merely requires *the Service* to apply state rules of law in determining allowability *for itself*. According to the Second Circuit's decision in the instant case, the statute is indifferent to rulings of a state trial-level court as to particular expenses for particular estates. 853 F.2d at 113.

Thus, in *Estate of Park v. Commissioner*, 475 F.2d 673 (6th Cir. 1973), the Sixth Circuit Court of Appeals interpreted section 2053(a) to mean that if a particular expense has been allowed under state probate proceedings as a charge against an estate, it is *necessarily* deductible under section 2053(a). "Congress has committed to the considered judgment of the states whether a particular expense is allowable as a proper or necessary charge against estate assets." *Id.* at 676.

The Seventh Circuit Court of Appeals has agreed with this construction of the statute. In *Estate of Jenner v. Commissioner*, 577 F.2d 1100 (7th Cir. 1978), the court followed *Park* in holding that if an expense has been found by a state probate court to be allowable, the full amount is "allowable" for purposes of the statute authorizing a deduction for administration expenses. "As a general rule the decree of a probate court approving expenditures as proper administrative expenses under state law will control." *Id.* at 1106. Both *Park* and *Jenner* rejected the notion that the deductibility of particular expenses depends on whether the Internal Revenue Service independently concludes that they are allowable under state law — the position the Service has advanced in the present case.

Several years later, the District Court for Nevada took a position similar to that of the Sixth and Seventh Circuits in a case that specifically involved the deductibility of attorneys' fees. In *First National Bank of Nevada v. United States*, 77-2 U.S. Tax Cas. (CCH) ¶ 13,207, p. 88,636 (D. Nev. 1977), a taxpayer sued for a refund of estate taxes, complaining that the Service had disallowed all but $60,000 of a $200,000 attorney's fee award made by a Nevada probate court. The issue, as stated by the district court, was whether the United States was entitled to litigate the reasonableness of a fee fixed by the state court in an estate proceeding. The district court, on the taxpayer's motion for summary judgment, held that it was not:

> Once a proper state court has allowed an attorney's fee, and such fee is paid, the Internal Revenue Service is without authority to disallow, as nondeductible under Section 2053 of the Internal Revenue Code of 1954, such fee or any part thereof, absent allegations of fraud or collusion, or the like supporting a conclusion that a fraud on the revenue had been perpetrated.

Id. at 88, 640-41. There was no appeal.

Several years later, the Service took essentially the same position on another Nevada estate, with the same result in favor of the taxpayer. In *Bank of Nevada v. United States*, 80-2 U.S. Tax Cas. (CCH) ¶ 13,361, p. 85,817 (D. Nev. 1980), the Service disallowed $450,000 of a deduction for a $839,000 attorney's fee allowed by the probate court with respect to an $18 million estate. The federal district court granted the taxpayer's motion for summary judgment in a refund suit, noting that there were "no unusual circumstances to take the case out of the general rule that a probate court's decree is ordinarily to be accepted."

In the present case, the Service concedes that attorneys' fees are, in general, allowable items of administrative expense.[1] The Service also concedes that New York law, as represented by the ruling of New York's highest court in *Estate of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974), governs the factors that affect the amount of an attorney's fee that may be charged against an estate as "allowable". However, the Service has little

[1] This rule is well established. *See, e.g., Dulles v. Johnson*, 273 F.2d 362 (2d Cir. 1959), *cert. denied*, 364 U.S. 834, 5 L. Ed. 2d 60 (1960). The present case thus does not involve the distinct, more difficult issue of whether an expense deductible under state law may nevertheless not be the type that is an "administration expense" within the meaning of the statute. *Compare Marcus v. DeWitt*, 704 F.2d 1227 (11th Cir. 1983); *Estate of Smith v. Commissioner*, 510 F.2d 479 (2d Cir. 1975), *cert. denied*, 423 U.S. 827, 46 L. Ed. 2d 44 (1975); and *Pitner v. United States*, 388 F.2d 651 (5th Cir. 1967), *with Estate of Park v. Commissioner*, 475 F.2d 673 (6th Cir. 1973) (discussed above at page 10).

interest in the result already reached by the Monroe County Surrogate Court, which has applied New York law to the very fee whose deductibility is in question.

Instead, the Service claims the liberty to apply the Freeman criteria itself to determine what was a reasonable fee for representing Mrs. Smith's estate. Then, presumably, the Service will allow a deduction for *its* amount for estate tax purposes.

The Second Circuit has now adopted the Service's position:

> [T]he IRS is entitled to make an independent assessment of the validity of White's fees under applicable state law as determined by the state's highest court. . . . In this case, although the IRS is bound by the *factors* established in *Freeman*, it is not bound by the Surrogate's application of those factors.

853 F.2d at 114 (A. 16).

This Court, it is respectfully submitted, should resolve the conflict in interpretation of section 2053(a) between the Sixth and Seventh Circuits, on one hand, and the Internal Revenue Service and the Second Circuit, on the other. The Service's position that a fee amount that has actually been *allowed* by a local probate court is not necessarily "allowable by the laws of the jurisdiction" turns the word "allowable" on its head.

Moreover, Congress can hardly have contemplated a duplicative process that requires the Service to perform, *de novo*, the same task of applying state law to a particular fee application that a probate court has already performed. Surely Congress intended, as it considered the interaction of federal tax law with state administration of decedents' estates, to permit taxpayers to rely on the deductibility of amounts approved by probate courts.

B. *The Decision of the Court Below Misconstrues This Court's Decision in Commissioner v. Estate of Bosch.*

In *Commissioner v. Estate of Bosch*, 387 U.S. 456, 18 L. Ed. 2d 886 (1967), this Court established the choice-of-law principle that where a state's highest court has not passed on an issue of *law* that is at issue in a federal proceeding, the government is not bound by rulings a lower court may have made on that issue. *Id.* at 465, 18 L. Ed. 2d at 893-94.

Bosch dealt with issues of law. But the Second Circuit Court of Appeals has now improperly construed *Bosch* to mean that federal authorities are also free to disregard a lower state court adjudication of matters of *discretion and fact* — even where the rule of law is not at issue — unless that determination is appealed to and affirmed by the state's highest court.

The *Bosch* decision resolved two appeals that dealt with separate legal issues that were unsettled under state law: whether a document purporting to release a general power of appointment was valid under New York law, and whether federal estate taxes should be prorated under Connecticut law notwithstanding a testamentary directive to the contrary. Local probate courts had been called upon to resolve both points of law without the benefit of controlling precedent from the appellate courts of New York and Connecticut. Neither decision was appealed. *Id.* at 457-61, 18 L. Ed. 2d at 889-92.

These lower court state rulings affected federal estate tax liability, and the issue on audit was whether they should be given conclusive effect for tax purposes. This Court agreed with the Service that the decisions of the trial-level courts were not controlling. *Id.* at 464-65, 18 L. Ed. 2d at 893-94. The Second Circuit has, however, now construed *Bosch* to mean that *no* adjudication of rights and obligations from a trial-level state court need be

honored by the Service unless that very decision has been appealed to and affirmed by the state's highest court. (A. 15)

The limited holding in *Bosch*, however, was simply that where a *rule of law* has not been settled by a state's highest court, the IRS is not necessarily bound to follow a lower court's view of the rule of law, but should attempt, like a lower state court, to ascertain what the law of the state actually is. In *Bosch*, of course, the issue was whether trial-level state-court rulings in cases involving the very taxpayers in question must be followed. The issue arose, however, because the trial-level ruling was on an unsettled issue of state *law*.

Thus, this Court in *Bosch* was concerned only with a choice-of-law question. It resolved it by analogy to the *Erie* doctrine, which governs choice-of-law questions in diversity cases: "state law as announced by the highest court of the State is to be followed." 387 U.S. at 475, 18 L. Ed. 2d at 893-94 (*see Erie R. R. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188 (1938)). As a corollary of the *Erie* doctrine, this Court observed, "the decision of a state trial court as to an underlying issue *of state law* should a fortiori not be controlling." 387 U.S. at 465, 18 L. Ed. 2d at 893 (emphasis supplied).

In other words, where the rule of law is in doubt, the goal of federal authorities should be to ascertain, by reference to lower court authorities or other persuasive data, what the highest court in the state would decide the rule of law to be. *Id.* As this Court held:

> This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. *If there be no decision* by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In

> this respect, it may be said to be, in effect, sitting as a state court.

Id. at 465, 18 L. Ed. 2d at 894 (emphasis supplied).

Unlike *Bosch*, the present case does *not* involve an unsettled issue of state law. *Bosch* is not on point because the "underlying substantive rule" governing an award of attorneys' fees in the Helen P. Smith estate is not in doubt. The substantive rule is unambiguously set forth in *Estate of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974). Neither the Monroe County Surrogate nor the Internal Revenue Service needs to divine what the state's highest court might consider as factors controlling an attorney's fee award.

The Second Circuit characterized the Surrogate's ruling as "one court's *interpretation* of applicable state *law*." 853 F.2d 107 at 114 (emphasis supplied). But the Monroe County Surrogate did not interpret or resolve any issue of New York law. He merely applied it, exercising his discretion on the basis of a *factual* record with which he was uniquely familiar, under standards unambiguously set forth by New York's highest court. This was a markedly different case from *Bosch* since, under *Freeman*, fee award determinations are "findings of fact." 34 N.Y.2d at 10, 355 N.Y.S.2d at 342.

Under the Second Circuit's ruling, the amount of the Surrogate's fee award to attorney White would be binding on the Internal Revenue Service only if someone had objected to it and appealed to the Appellate Division of the Supreme Court, and then only if the fee was *also* approved on further appeal to the New York Court of Appeals. Under New York law, however, such a scenario is fanciful, because the Surrogate's exercise of discretion on fee awards is not reviewable in the New York Court of Appeals. That court has stated that "we do not review" awards of attorneys' fees because they are "matters resting in discre-

tion." *In re Noll*, 273 N.Y. 219, 225-26 (1937). *Accord, Estate of Aaron*, 30 N.Y.2d 718, 332 N.Y.S.2d 891 (1972).

If the Service were correct that no Surrogate Court fee award is binding unless and until it has been specifically approved by the New York Court of Appeals, therefore, the perverse result would be that *no* Surrogate Court award would *ever* be binding on the Service. It has been 14 years since an issue as to the amount of any particular estate attorney's fee was last litigated all the way to the New York Court of Appeals. That was the *Freeman* case itself (*Estate of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974)), and the issue was one of *law*, not whether the Surrogate's decree was proper as a matter of fact and discretion. Indeed, the Court of Appeals, citing *Noll*, pointedly noted that it was "powerless" to overturn an independent determination by the Surrogate. 34 N.Y.2d at 10, 355 N.Y.S.2d at 341-42.

The court below failed to distinguish between issues of law, which are controlled by *Bosch*, and issues of fact and discretion, which are not. This Court should grant this Petition for a Writ of Certiorari in order to rectify the Second Circuit's misconstruction of the decision in *Bosch*.

C. *The Ruling of the Court Below Makes the Requirement of "Relevance" a Dead Letter.*

Under *United States v. Powell*, 379 U.S. 48, 13 L. Ed. 2d 112 (1964), the first factor for judicial enforcement of a summons is a showing that the investigation will be conducted for a legitimate purpose. *Id.* at 57, 13 L. Ed. 2d at 119. Because, as already discussed, the Service has no business attempting to revisit and redetermine a fee amount that has been fixed by the New York Surrogate Court, the fundamental purpose of its purported investigation is illegitimate.

In any case, however, *Powell* also requires that the Service's inquiry be "relevant" to its purpose. *Id.* In the present case the Service's position has been hopelessly inconsistent. On the surface, the Service assures the courts that it wants nothing more than to apply the *Freeman* criteria independently in order to value attorney White's services to Mrs. Smith's estate. But this Court need look no further than the Service's summonses (A. 46, 50) to see that the real focus of the Service's inquiry is White's recorded time and his customary hourly rates. The Service plainly wants to ascertain whether White's fee is justified on an hourly rate basis.

Hours expended and hourly rates are irrelevant under New York law. In Estate of Freeman, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974), an attorney's fee of $13,250 was ultimately approved as a charge against an estate whose principal amounted to $314,959.[2] In the exercise of the Surrogate's discretion, the New York Court of Appeals stated, the factors relevant to a fee award include

— time and labor required,

— difficulty of the questions presented and the skill required to handle the problems presented,

— the lawyer's experience, ability, and reputation,

— the amount involved,

— the benefit to the client from the services,

— community custom and practice regarding estate attorneys' fees,

— the contingency or certainty of compensation,

— results obtained, and

[2] By comparison, the Surrogate in the present case approved an attorney's fee of $16,800 for services rendered to an estate of approximately $450,000.

— responsibility involved.

34 N.Y.2d at 6, 9-10, 355 N.Y.S.2d at 337-38, 340-41. The court singled out "amount involved" and also emphasized the legitimacy of "customary fees" as a proper factor. *Id.* at 9-10, 355 N.Y.S.2d at 341.[3]

Under *Freeman*, what is relevant is "time and effort *required*," not, as the Service seems to think, "time and effort actually *expended*." Under New York law:

> The value of an attorney's services cannot be limited to "specified and detailed bills of particulars with a specified amount for each item, as in the case of goods sold, or mere manual services rendered."
>
> . . . .
>
> The standards by which the value of such services is measured is, however, the fair and reasonable value of the services rendered after considering the various elements referred to. I do not think items as to *time actually employed* in work on the case are of much importance. It is the ability of the attorney and his capacity and success in handling large and important matters and in commanding large fees therefor, the amount involved, and the result obtained, which are of prime importance in determining what constitutes a just and reasonable charge.

Matter of Pott's Estate, 213 A.D. 59, 62, 209 N.Y.S. 655, 657-58 (4th Dep't), *aff'd*, 241 N.Y. 593 (1925) (emphasis supplied). The more recent *Freeman* decision relies on *Pott's Estate* and does not permit the conclusion that time *actually* expended, or customary hourly rates, are factors that a New York Surrogate is obligated to consider in allowing an estate attorney's fee.

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[3] The *Freeman* guidelines accord with long-standing New York case law, *see Matter of Pott's Estate*, 213 A.D. 59, 209 N.Y.S. 655 (4th Dep't), *aff'd*, 241 N.Y. 593 (1925), and they are regularly utilized and cited in estate administration matters, *e.g.*, *Matter of Wilhelm*, 88 A.D.2d 6, 12, 452 N.Y.S.2d 957, 961 (4th Dep't 1982).

Indeed, in *Freeman* the Court of Appeals rejected arguments that a Surrogate, in fixing an attorney's fee, should rely primarily on evidence as to services performed. *See* 34 N.Y.2d at 2 (official reporter's summary of arguments of counsel). The factors enumerated by the Court were — except for "size of the estate" — intangible matters that cannot be injected into a formula or quantified. The court clearly intended, instead, to invest local Surrogates with a large measure of discretion. 34 N.Y.2d at 9-10, 355 N.Y.S.2d at 341. "There is no hard and fast rule for determining reasonable compensation. . . ." *Matter of Wilhelm*, 88 A.D.2d 6, 12, 452 N.Y.S.2d 957, 961 (4th Dep't 1982).

The Second Circuit has correctly noted that "relevance" under *Powell* is not the same as "relevance" under rules of evidence. 853 F.2d at 116. Under *Powell*, records may be obtained by the Service merely if they "may be" relevant to an investigation. *United States v. Powell*, 379 U.S. 48, 57, 13 L. Ed. 2d 112, 119 (1964); *see* Int. Rev. Code § 7602. But the decision of the court below demonstrates that the Second Circuit is unwilling to take a hard look at summonses that seek materials that are not even potentially relevant to a determination of tax liability. The Service's emphasis on "time spent" and "hourly rates" shows that it has no genuine intention of applying *Freeman* at all. Those items are simply not "relevant", or even potentially relevant, to an "allowable" fee under New York law.

D. *Countervailing Considerations of Federalism Require Deference to State Court Determinations in Matters of Estate Administration.*

The court below was critical (813 F.2d at 117) of the district court for its sensitivity to considerations of comity and federalism in construing section 2053(a). The court seems not to have considered, however, either the unique ability of a local probate court to knowledgeably evaluate the relevant circumstances

under state law, the impossible burden its ruling will place on taxpayers and ultimately on the federal courts, or its ruling's potential for engendering new litigation.

1. Federal authorities are not in a position to effectively apply the *Freeman* criteria.

No matter whether a Surrogate Judge or the Service determines the fair value of legal services to an estate, the criteria set forth in *Estate of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974), must nevertheless be applied. Local probate judges are able to apply those criteria out of a first-hand store of experiences. Federal authorities cannot.

For example, under *Freeman* a reasonable attorney's fee depends in part on the difficulty of the questions involved in the estate and the skill required to handle them. *Id.* at 9, 355 N.Y.S.2d at 341. A probate court judge knows the problems of individual estates because he has overseen and, in many cases, helped to resolve them. But a government tax attorney or a federal court is unlikely to appreciate the ease or complexity of estate administration issues without lengthy explanations and can never achieve the perspective of a probate judge.

Similarly, under *Freeman* the experience, ability, and reputation of the attorney handling the estate, together with the customary fees charged by the Bar for similar services, must be considered. *Id.; see Shalman v. Levinson*, 68 A.D.2d 940, 414 N.Y.S.2d 70 (3d Dep't 1979). Local probate judges know the local estate bar; they can draw on personal knowledge in considering these factors. Federal tax auditors and federal judges, on the other hand, are typically unfamiliar with the ability and standing of local estate lawyers and customary fees in the community. They will be unable to assess these factors without expert assistance.

Again, under *Freeman* a Surrogate Judge is required to consider how much an estate has benefited from the services of its lawyer. 34 N.Y.2d at 9, 355 N.Y.S.2d at 341. But federal authorities would have to review virtually the entire administration of an estate — including aspects in which they have no expertise — to determine how a lawyer's work benefited his client. Local probate judges, on the other hand, know first-hand the benefits particular services confer.

Thus, the discretion vested in the New York Surrogate Court to set attorneys' fees presupposes a judge's personal knowledge of estate administration generally, of the problems of particular estates, of the estate bar and its practices, and of individual estate attorneys. The Internal Revenue Service lacks first-hand knowledge of estate administration. It is ill-situated to apply the *Freeman* criteria and prone, as its practices in western New York demonstrate, to substitute its own notions of how fees ought to be set. The absence of any likelihood whatsoever that the Internal Revenue Service could apply local standards such as the *Freeman* criteria even half as well as a local probate court was surely a principal reason why the authors of I.R.C. Section 2053(a) chose to make "allowability" under state law the test for estate tax deductibility.

2. The approach of the lower court portends delay in settling estates, uncertainty on the part of taxpayers, and a demeaning of the legitimate role of state probate courts.

Estate taxpayers will find themselves in an unenviable position under the Second Circuit's and Service's approach. In preparing an estate tax return, an executor is bound to take a deduction for the attorney's fee approved by the probate court. But that figure will almost certainly be revised by the Service if it audits the return under the standards approved by the Second Circuit. Only by coincidence will the Surrogate's view of a reasonable attor-

ney's fee, based on his application of the *Freeman* criteria, be the same as the Service's independent assessment.

Freeman sets forth no mathematical formula for attorneys' fees that will allow the Surrogate to calculate, the executor to double-check, or the Service to merely verify the amount. Instead, *Freeman* requires the exercise of *discretion* — an inherently subjective determination — and it would be a rare case in which two authorities exercise discretion with precisely the same result.

Consequently, estate tax liability will be revised on a routine basis, not in order to correct errors that an executor might with due diligence avoid, but to reflect *de novo* determinations by the Service that an executor cannot conceivably predict. No matter what he reports on the return, the executor can never know the actual tax liability of his estate unless and until the return is audited and the Service has made its *own* assessment of a reasonable fee.

The product will be delay and uncertainty in estate administration and virtual obliteration of the role of local probate courts. The fee award of a New York Surrogate will be of little more than academic interest; the amount ultimately approved by the Service will be the one that matters.

Congress could not have intended this. As District Judge Telesca pointed out in his decision (650 F. Supp. at 909) (A. 38-41), the courts have long recognized the special province of states in matters of decedents' estates administration. *New York Trust Co. v. Eisner*, 256 U.S. 345, 65 L. Ed. 963 (1921); *Byers v. McAuley*, 149 U.S. 608 (1893); *see Giardina v. Fontana*, 733 F.2d 1047 (2d Cir. 1984). Concern for a "proper respect for state functions" under our federal system, *see Younger v. Harris*, 401 U.S. 37, 44, 27 L. Ed. 2d 669, 675 (1971), is never more appropriate

than in cases involving the administration of decedents' estates. As Justice Black commented in *Younger*, federalism represents

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44, 27 L. Ed. 2d at 676. Given the strong interest and competence of the states in matters pertaining to decedents' estates, District Judge Telesca properly invoked Justice Harlan's views in dissent in the *Bosch* case:

> [T]he federal interest requires only that the Commissioner be permitted to obtain from the federal courts a considered adjudication of the relevant state law issues in cases in which, for whatever reason, the state courts have not already provided such an adjudication. In turn, it may properly be assumed that the state court has had an opportunity to make, and has made, such an adjudication if, in a proceeding untainted by fraud, it has had the benefit of reasoned argument from parties holding genuinely inconsistent interests.

Commissioner v. Estate of Bosch, 387 U.S. 456, 480-81, 18 L. Ed. 2d 886, 902 (1967) (Harlan, J., dissenting).

White's position in this case does not threaten, as the Second Circuit may have feared, to undermine the summons enforcement powers of the Internal Revenue Service, which can still exercise its broad powers to investigate the possibility that state decrees have been obtained by collusion, fraud, or the like. The objectionable aspect of the Second Circuit's ruling is not its reaffirmation of the Service's subpoena powers, but its assertion that the Service can use the materials it subpoenas to review fee amounts *de novo*. Collateral review of this sort exceeds the Congressional warrant.

Section 2053(a)'s reference to allowability under state law is an explicit recognition of the overriding interest of the states in estate administration. It should not be construed, as the court below has done, to undermine that interest.

3. The approach of the lower court will engender unnecessary new federal court litigation.

The approach sanctioned by the court below will spawn a new species of litigation over estate attorneys' fees. Until now, as the New York cases cited above at pages 15-16 demonstrate, a Surrogate Court's award of attorneys' fees has been subject to reversal in the Supreme Court, Appellate Division only on the basis of abuse of discretion; it may not be reviewed at all in the Court of Appeals. In this manner New York law effectively discourages extensive litigation concerning attorneys' fees. But if the decision of the Second Circuit is allowed to stand, estate attorneys' fee amounts *will* routinely be litigated — but in federal, not state court.

In its machinations over the Smith estate, the Internal Revenue Service has given a glimpse of the future. In the present matter, petitioner White paid the deficiency assessed against the Smith estate when the Service arbitrarily disallowed the entire attorneys' fee awarded by the Surrogate. He was then required to sue for a refund in a collateral proceeding in the Western District of New York. After the Second Circuit rendered its decision in this case, the Service filed a demand for a *jury* trial in the refund action!

What will be tried before this jury — and in the other refund actions that other executors are sure to institute now that the Second Circuit has given its blessing to collateral review of fee awards by federal tax authorities? Will Mr. White be compelled to justify his fee by introducing expert testimony from estate

practitioners as to the work required, the complexity of the matter, and the benefit to the estate? Will he need to call to the witness stand other members of the Monroe County bar to attest to his experience, ability, and reputation? Will he be required to produce Surrogate Judge Ciaccio to testify as to community custom and practice regarding fees? Will the Service then be permitted to cross-examine the Surrogate as to whether he fully considered all the *Freeman* criteria before authorizing Mr. White's fee?

It is respectfully submitted that Congress could not have contemplated the possibility of federal court trials — whether by judge or by jury — over the reasonableness of attorneys' fees in estate matters. Surely Congress intended, instead, to preclude such litigation by authorizing an *unqualified* deduction for such administrative expenses as are "allowable" under state law.

CONCLUSION

No federal interest is served by permitting the Internal Revenue Service or the federal courts to redetermine the reasonableness of an attorney's fee that has already been considered and approved by a state probate court. Congress authorized the Smith Estate to deduct administrative expenses that were "allowable" under the laws of the State of New York, and the Monroe County Surrogate Court did allow Mr. White's fee. No proper purpose was served, therefore, by Internal Revenue summonses seeking records that would aid the Service in redetermining the reasonable value of Mr. White's services.

The circuit courts are divided on this issue, which implicates the construction of this Court's *Bosch* decision and threatens to undermine settled principles of federalism. It is respectfully urged, therefore, that the Court grant the petition and set the case for argument.

December 2, 1988

Respectfully submitted,

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APPENDIX

88-928 (0)

In The

Supreme Court of the United States

October Term, 1988

JAMES M. WHITE, as attorney for and as the Executor of the Estate of Helen P. Smith, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA and JAMES M. SERLING, Estate Tax Attorney, Internal Revenue Service,

Respondents.

APPENDIX

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U.S. v. WHITE
Cite as 853 F.2d 107 (2nd Cir. 1988)
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UNITED STATES of America, and James M. Serling, Estate Tax Attorney, Internal Revenue Service, Petitioners-Appellants,

v.

James M. WHITE, as attorney for and as executor of the Estate of Helen P. Smith, deceased, Respondent-Appellee.

No. 83, Docket 87-6046.

United States Court of Appeals,
Second Circuit.

Argued Sept. 3, 1987.

Decided Aug. 2, 1988.

Federal government petitioned for enforcement of two IRS summonses requiring executor to substantiate deductions he claimed on federal estate tax return. The United States District Court for the Western District of New York, Michael A. Telesca, J., 650 F.Supp. 904, denied petition, and Government appealed. The Court of Appeals, Pierce, Circuit Judge, held that: (1) Government established prima facie case for enforcement of IRS summonses; (2) IRS could investigate expenses claimed as deduction on federal estate tax return and obtain enforcement of summons, although expenses previously had been approved under state law by state trial court; (3) executor's own books and records were relevant to Internal Revenue Service's investigation; and (4) federalism and comity did not constitute substantial countervailing policy that would justify imposing requirement

upon IRS to make advance showing of fraud, overreaching, or excessiveness by executor or state trial court before allowing enforcement of summonses.

Reversed and remanded.

1. Internal Revenue 4513

Government established prima facie case for enforcement of IRS summonses to compel executor of estate to substantiate deductions he claimed on estate tax return; IRS agent submitted affidavit which averred that purpose of investigation was to determine correct tax liability, that summoned books and records were necessary, that books and records were not already in possession of IRS, and that administrative steps required by Code had been followed. 26 U.S.C.A. §7602.

2. Internal Revenue 4512

Once government has established prima facie case for enforcement of IRS summonses, burden shifts to taxpayer to disprove existence of valid tax determination purpose for IRS inquiry.

3. Internal Revenue 3016

Internal Revenue Service could investigate expenses claimed as deduction on federal estate tax return, and obtain enforcement of summonses issued to carry out investigation, although expenses had previously been approved under state law by state trial court; state trial court decrees are not determinative of federal deductibility of expenses to exclusion of any federal inquiry, and IRS may make independent assessment of deductibility of expenses under state law and assess acceptability of court decree for federal tax purposes. 26 U.S.C.A. § 2053(a)(2).

4. Internal Revenue 4496

Executor's own books and records were relevant in proceeding to enforce summons issued to carry out Internal Revenue Service's investigation of expenses claimed as deduction on federal estate tax return, despite executor's contention that only records of state trial court, which previously approved expenses, were relevant; IRS need establish no more than potential relevance of taxpayer's books and records in summons enforcement proceeding.

5. Internal Revenue 4490

In appropriate circumstances, broad latitude given IRS in use of its summons power may be restricted in light of substantial countervailing policies.

6. Internal Revenue 4508

Federalism and comity did not constitute substantial countervailing policies that would justify imposing requirement upon Internal Revenue Service to make advance showing of fraud, overreaching, or excessiveness by executor of estate or state trial court before allowing enforcement of summons issued to carry out investigation of expenses claimed as deduction on federal estate tax return, although expenses had previously been approved under state law by state trial court.

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Robert M. Kaufman, New York City (George DeSipio, Albert Kalter, New York City, of counsel), for the Ass'n of the Bar of the City of New York, submitted briefs as amici curiae.

Edward D. Bloom, Esq., Harris, Beach, Wilcox, Rubin & Levey, Michael F. Buckley, Harter, Secrest & Emery, John L. Garrett, Nixon, Hargrave, Devans & Doyle, Rochester, N.Y., for the Monroe County Bar Ass'n submitted a brief as amicus curiae.

Before FEINBERG, Chief Judge, and PIERCE and ALTIMARI, Circuit Judges.

PIERCE, Circuit Judge:

The United States of America and James M. Serling, an estate tax attorney in the Internal Revenue Service ("IRS" or the "government"), appeal from a judgment of the United States District Court for the Western District of New York, Michael A. Telesca, *Judge*, which denied appellants' petition for an order enforcing two IRS summonses issued to the respondent, James M. White, an attorney. *United States v. White*, 650 F.Supp. 904 (W.D.N.Y. 1987). The district court found that the IRS had failed to show that the summonses were issued pursuant to a legitimate tax purpose, as is required for summons enforcement under *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). According to the court, the IRS was foreclosed from

investigating the deductibility of White's attorney's fees, as claimed on a federal estate tax return, because of a prior New York State Surrogate's Court decree that had approved White's attorney's fees under New York law. The district court held that, because (1) "the Surrogate ... passed on the facts upon which deductibility depends," 650 F.Supp. at 909; and (2) the IRS did not make a prima facie showing that the Surrogate's decision was motivated by impermissible factors "such as fraud, overreaching, or excessiveness by the attorney or the Surrogate," the IRS was therefore bound by the Surrogate's decision. *Id.* at 911.

We believe that the district court erred in concluding that the Surrogate's decree precludes the IRS from investigating the deductibility of White's attorney's fees. Because the objective of the investigation was to obtain information that may be used in determining whether there is federal tax liability, the IRS had a legitimate purpose for issuing its summonses under *Powell*. Moreover, we find the district court's summons enforcement requirement that the IRS must make a prima facie showing of "fraud, overreaching, or excessiveness by the attorney or the Surrogate" to be inconsistent with *Powell*'s holding that only a showing of a legitimate purpose, and not a showing of probable cause, is required for summons enforcement of its summonses and we therefore reverse.

BACKGROUND

The facts of this case are set forth in full in the district court's opinion, reported at 650 F.Supp. 904. We refer herein only to those facts necessary to address the issues presented on appeal. In July 1984, the Surrogate's Court of Monroe County, New York, granted a decree of judicial settlement of the Estate of Helen P. Smith. Under New York law, *see* N.Y.Surr.Ct. Proc.Act § 2307 (McKinney 1967 & Supp. 1988), this decree had the effect, *inter alia*, of approving attorney's fees of $16,800 and an executor's

commission of $17,548.13. James M. White, the respondent-appellee, was both the executor and the attorney for the estate. He filed a federal estate tax return which claimed deductions of $16,530 for his attorney's fees and $17,450 as the executor's commission.

In August 1984, petitioner-appellant James M. Serling, a tax attorney for the IRS, met with White to review the estate tax return. White informed Serling that the Surrogate had signed a judicial decree of settlement for the estate. In January 1985, Serling wrote to White requesting his time records or other documentation of legal work undertaken for the estate, stating that White was required to provide justification for his attorney's fees notwithstanding the Surrogate's decree. In February 1985, White responded by forwarding a letter he had obtained from the Surrogate which stated that White's attorney's fees were valid under New York law.

Pursuant to the IRS's summons authority under § 7602 of the Internal Revenue Code of 1954 ("I.R.C." or the "Code"), 26 U.S.C. § 7602 (1982), Serling then sent two summonses to White, one in May 1985 and one in February 1986. The May 1985 summons sought all records and documents relating to the administration of the estate, including records of White's activities as attorney and as executor. The February 1986 summons sought all records relating to White's performance of his duties as executor of the estate. White refused to comply with the summonses, relying on the Surrogate's prior approval of his attorney's fees under New York law. Based on this refusal, the IRS issued a deficiency note to White on behalf of the estate in July 1986 which disallowed the claimed attorney's fees and reduced the executor's commission from $17,450 to $16,804. Apparently, White does not contest the reduction in the executor's commission. White paid the deficiency in the amount of $5,754.19 and filed a notice

of claim for a refund; that claim in not presently before this Court.

Appellants commenced this summons enforcement proceeding in August 1986. In January 1986, the district court, in a thorough opinion, denied the petition for enforcement of the two summonses principally on the ground that the IRS did not show that the investigation would be conducted for a legitimate purpose as required by *Powell*. The Code permits a deduction to be taken for estate administrative expenses allowable under state law, *see* I.R.C. § 2053(a)(2), and an associated regulation ordinarily makes state court decrees related to the allowability of such expenses binding on the IRS if the court "passed upon the facts upon which deductibility depends," *see* Treas.Reg. § 20.2053-1(b)(2). The district court concluded that "the IRS cannot second-guess the Surrogate" when the Surrogate has found such expenses to be valid under state law unless the IRS makes "a prima facie showing that the Surrogate's decision was motivated by factors other than those on which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate." 650 F.Supp. at 911. Without such a standard to support enforcement of these summonses, the district court stated, IRS investigations of amounts approved by state courts " 'would be destructive ... of the proper relationship between State and Federal law.' " *Id.* at 909 (quoting *Commissioner v. Estate of Bosch*, 387 U.S. 456, 480, 87 S.Ct. 1776, 1790, 18 L.Ed.2d 886 (1967) (Harlan, J., dissenting)). Finding that the IRS failed to meet this standard, the district court held that "the decision of the Surrogate should be accepted [by the IRS]." *Id.* Concluding therefore that the IRS had no legitimate purpose in investigating the deductibility of fees previously approved by the Surrogate, the district court denied the government's petition for summons enforcement and the government appealed.

DISCUSSION

I

The issue presented to us is whether the IRS may investigate expenses claimed as a deduction on a federal estate tax return, and obtain enforcement of summonses issued to carry out such an investigation, where the subject expenses previously had been approved under state law by a state trial court. The government argues that the district court erred in denying its petition for summons enforcement because the summonses were validly issued under the authority of § 7602 of the Internal Revenue Code of 1954 and because the IRS had met its burden of showing that they were issued for a legitimate investigative purpose, in accordance with the requirements of *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964), for judicial enforcement of summonses.

The IRS is authorized to issue summonses, *inter alia*, "to examine any books, papers, records, or other data which may be relevant or material" to an inquiry "[f]or the purpose of ascertaining the correctness of any return." I.R.C. § 7602. In enacting § 7602 of the Code, Congress endowed the IRS with "expansive information-gathering authority" in order to encourage effective tax investigations. *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S.Ct. 1495, 1502, 79 L.Ed.2d 826 (1984). Because the summons authority is "necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code," *United States v. Euge*, 444 U.S. 707, 711, 100 S.Ct. 874, 878, 63 L.Ed.2d 141 (1980), the Supreme Court has consistently held that restrictions on the IRS's summons power should be avoided "absent ambiguous directions from Congress." *United States v. Bisceglia*, 420 U.S. 141, 150, 95 S.Ct. 915, 921, 43 L.Ed.2d 88 (1975); *see also Euge*, 444 U.S. at 711, 100 S.Ct. at 878 (the summons authority "should be upheld

absent express statutory prohibition or substantial countervailing policies").

In *Powell*, the Supreme Court set forth the standards to be met by the IRS in order to obtain judicial enforcement of a summons. In that case, the IRS had issued a summons for the records of a taxpayer whose returns had been previously examined and where the federal three-year statute of limitations barred assessment of additional deficiencies except in cases of fraud. 379 U.S. at 49, 85 S.Ct. at 250-51. The taxpayer refused to obey the summons, claiming that the IRS must first show probable cause to suspect fraud. *Id.* The Court rejected this contention and held that, in order to obtain summons enforcement, the IRS need only show that: (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to that purpose; (3) the information sought is not already within the Commissioner's possession; and (4) the administrative steps required by the Code have been followed. *Id.* at 57-58, 85 S.Ct. at 255. Any other standard, the Court stated, "might seriously hamper the Commissioner in carrying out investigations he thinks warranted." *Id.* at 54, 85 S.Ct. at 253.

According to *Powell*, the government establishes a prima facie case for summons enforcement by demonstrating compliance with these standards; the burden then shifts to the taxpayer to challenge these showings "on any appropriate ground," including a showing that the summons had been issued for an improper purpose, such as to harass the taxpayer, to put pressure on him to settle a collateral dispute, or "for any other purpose reflecting on the good faith of the particular investigation." *Id.* at 58, 85 S.Ct. at 255; *see also United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 316, 98 S.Ct. 2357, 2367, 57 L.Ed.2d 221 (1978); *United States v. Antonio J. Sancetta, M.D., P.C.*, 788 F.2d 67, 71 (2d Cir.1986). If the taxpayer sustains this burden of demonstrating a failure by the government to meet the four *Powell* criteria, then the court

should deny enforcement of the summons, since any other result would constitute an abuse of the court's process. *Powell*, 379 U.S. at 58, 85 S.Ct. at 255. If the taxpayer fails to meet his burden, then enforcement should be granted. *Id.*

Subsequent cases have held that the government's burden of proof of its compliance with the *Powell* standards is minimal, *see United States v. Davey*, 543 F.2d 996, 1000 (2d Cir.1976); *United States v. Balanced Financial Management, Inc.*, 769 F.2d 1440, 1443 (10th Cir.1985), and that the government may even establish its prima facie case by the affidavit of an agent involved in the investigation averring each *Powell* element. *See Alphin v. United States*, 809 F.2d 236, 238 (4th Cir.), *cert denied*, ___U.S.___, 107 S.Ct. 1578, 94 L.Ed.2d 768 (1987); *United States v. Kis*, 658 F.2d 526, 536 (7th Cir.1981), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982). In contrast, the taxpayer's burden of proof to establish that enforcement would be improper is significantly greater than the burden on the government to show a legitimate purpose. *Kis*, 658 F.2d at 535. In the words of the Supreme Court, the taxpayer's burden is a "heavy" one, which he must meet by "disprov[ing] the actual existence of a valid civil tax determination or collection purpose by the Service." *LaSalle*, 437 U.S. at 316, 98 S.Ct. at 2367.

The imposition of a heavier burden on the taxpayer in a summons enforcement proceeding is intended to facilitate the IRS's investigative process. *Kis*, 658 F.2d at 535. Summons enforcement proceedings are intended to be summary in nature so that an investigation can advance to an ultimate determination as to whether tax liability exists. *Id.* These proceedings generally occur at the early investigative stage of any tax inquiry involving a taxpayer, when no guilt or liability of the taxpayer has been established. *Id.* Therefore, the primary issue presented by a summons proceeding is *not* whether the IRS has established, or is even likely to establish guilt or liability on the taxpayer's part; rather,

the issue is whether the IRS had a valid tax determination or collection purpose in issuing its summons.

II

In determining the enforceability of the summonses herein, we must consider whether the government met the four-part test under *Powell*, and, if it did, whether White demonstrated that enforcing the summonses would constitute an abuse of the court's process. We consider first whether the government met its burden of proof under *Powell*.

A. *The Government's Burden of Proof*

[1] The government's petition for enforcement was supported by IRS Agent Serling's affidavit, which averred that (1) the purpose of his investigation was to determine the correct tax liability of the Estate of Helen P. Smith; (2) the summoned books and records were necessary for this purpose; (3) the books and records were not already in the possession of the IRS; and (4) the administrative steps required by the Code had been followed. Just on the basis of this affidavit, it is clear that the government did establish a prima facie case for enforcement. *See, e.g., Sancetta*, 788 F.2d at 71; *United States v. Beacon Hill Fed. Sav. & Loan*, 718 F.2d 49, 52 (2d Cir.1983); *Kis*, 658 F.2d at 536-37.

The declared purpose of the subject investigation is unquestionably legitimate under § 7602, which authorizes the issuance of summonses "[f]or the purpose of ascertaining the correctness of any return." Contrary to White's argument that the purpose must be stated with more specificity, the IRS is required to declare only a "good-faith pursuit of the congressionally authorized purposes of § 7602," *LaSalle*, 437 U.S. at 318, 98 S.Ct. at 2368. This we believe the IRS has done.

With regard to relevance, White's books and records relating to legal work performed for the estate are clearly relevant to the IRS's declared purpose under § 7602, which authorizes the issuance of a summons for books and records "which *may be* relevant ... to such inquiry (emphasis added). *See also Arthur Young,* 465 U.S. at 814, 104 S.Ct. at 1501 ("The language 'may be' reflects Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation....") (emphasis in original); *Davey*, 543 F.2d at 1000 (the test of relevance is whether the inspection might throw light on the correctness of the taxpayer's return). Serling's remaining declarations, that the IRS does not have White's records in its possession, and that the proper administrative procedures have been followed, satisfy the remaining *Powell* criteria.

B. *Non-existence of a Valid Tax Determination Purpose*

[2] Once the government has established a prima facie case for enforcement, the burden shifts to the taxpayer to disprove the existence of a valid tax determination purpose for the IRS inquiry. *Powell*, 379 U.S. at 58, 85 S.Ct. at 255. It is at this stage that we consider White's challenge to the legitimacy of the IRS's declared purpose and "inquire into the underlying reasons for the examination." *Id.* at 58, 85 S.Ct. at 255. To ascertain whether White has met his "heavy" burden in this regard, we turn to White's claim that no legitimate purposes exists for the IRS investigation.

White argues in essence that, in light of the Surrogate's prior approval of his attorney's fees, the IRS has *no* legitimate purpose in summoning his books and records because the Surrogate's decision is binding on the IRS. We note that this case does not involve any allegation of a lack of "good faith" by the IRS, in the sense that White does not claim that the IRS issued the summonses to harass him or to pressure him into settling a collateral

dispute. Nor does White assert that the Surrogate's decree is binding on the IRS based on the full faith and credit provision of 28 U.S.C. § 1738, or based on principles of re judicata and collateral estoppel. Rather, he asserts that, as a matter of law, there is no need for him to produce his records because the IRS is constrained by relevant Code and regulatory provisions to accept the Surrogate's decree.

In agreeing with White that the IRS is bound by the Surrogate's decree, the district court relied primarily on Treas.Reg. § 20.2053-1(b)(2) and not its associated statute, I.R.C. § 2053(a)(2). Nonetheless, we must first examine the statute to determine whether there exists evidence of "unambiguous directions from Congress," *Bisceglia*, 420 U.S. at 150, 95 S.Ct. at 921, restricting the IRS's summons power when a state court applying state law has found "allowable" the attorney's fees that are the subject of IRS scrutiny.

1. I.R.C. § 2053(a)(2)

Section 2053(a) of the Code sets forth certain deductions allowable in determining the value of a taxable estate. In relevant part, § 2053(a) authorizes deductions of such amounts for administrative expenses "as are allowable by the laws of the jurisdiction ... under which the estate is being administered." I.R.C. § 2053(a)(2). White interprets the statute as making state court decrees which approve administrative expenses under state law conclusive and binding on the IRS; this, by inference, would render subsequent tax investigations of such expenses pointless.

We do not read the statute as giving state *trial* court decrees preclusive effect with regard to IRS investigations. To be sure, the plain language of § 2053(a)(2) indicates that the federal deductibility of estate administrative expenses is governed by state law. Thus, under this statute, the state rules applicable to the allowability of these expenses have been "absorbed" as the rele-

vant federal rules relating to the deductibility of such expenses. *See* C. Wright, The Law of Federal Courts § 60, at 94-95 (4th ed. 1983) ("sometimes the federal statute will direct that state law be applied," in which case "the state rule has merely been absorbed as the relevant federal rule"). Although the statute directs the IRS and federal courts to apply state rules, the deductibility of such expenses nonetheless remains a federal question. The statute does not address the effect of state trial court approval of estate administrative expenses under federal law. In the absence of preclusive language in the statute, we are not persuaded that Congress unambiguously intended to make state trial court decrees determinative of the federal deductibility of such expenses to the exclusion of any federal inquiry.

Moreover, any suggestion that Congress intended to preclude IRS investigation into the deductibility of White's fees under state law is untenable in light of the Supreme Court's reasoning in *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967). In *Bosch*, the Supreme Court addressed the problem of what effect must be given a state trial court decree where the issue addressed by such decree has federal estate tax consequences. *Id.* At issue in *Bosch* was a federal estate tax deduction whose validity under I.R.C. § 2056(b)(5) depended on the invalidity under state law of an instrument executed by the decedent's wife. In a separate proceeding, to which the IRS was not a party, a state trial court held the instrument invalid, which conclusion was disputed by the IRS with regard to the claimed federal estate tax deduction.

In considering the effect of the state court determination in a subsequent federal tax proceeding, the Supreme Court found that Congress, in enacting I.R.C. § 2056(b)(5), had intended to give "proper regard" and not "finality" to the interpretations of state law by state trial courts. "If the Congress had intended state trial court determinations to have [a conclusive and binding] effect on the federal actions, it certainly would have said so—which it did not do." 387 U.S. at 464, 87 S.Ct. at 1782. Using diversity cases as its guide, the *Bosch* court applied the rule of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), that a federal court will give effect to a state court decree, if at all, "only after *independent examination* of the state law as determined by the highest court of the State." 387 U.S. at 463, 87 S.Ct. at 1781 (emphasis added). Consequently, the Supreme Court concluded in *Bosch* that "when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should ... not be controlling." *Id.* at 465, 87 S.Ct. at 1782. While federal authorities are bound to apply state law as determined by the state's highest court, they need only give "proper regard" to relevant rulings of other courts in the state and "may be said to be, in effect, sitting as a state court." *Id.* In *Bosch*, therefore, the Court found that the IRS was entitled to make an independent assessment as to the validity *vel non* of the instrument under applicable state law as determined by the state's highest court.

[3] We believe the ruling in *Bosch* supports the view that the Surrogate's decree is not conclusive and binding on the IRS under I.R.C. § 2053(a)(2). Like the statutory provision at issue in *Bosch*, I.R.C. § 2053(a)(2) gives no indication that Congress intended the Surrogate's decision to be preclusive. We conclude that, with regard to the federal deductibility of White's fees, the IRS is entitled to make an independent assessment of the validity of White's fees under applicable state law as determined by the state's highest court. Contrary to White's claim, the mere fact that the Surrogate issued a decree does not preclude the IRS from investigating the deductibility of White's fees under state law.

The district court in this case interpreted *Bosch* differently. Because the New York Court of Appeals has already set forth the factors to be considered when determining the validity of attor-

ney's fees in estate practice, *see In re Estate of Freeman*, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 (1974), and since the Surrogate's letter to White stated that that it had applied these factors, the district court concluded that the IRS is bound by the Surrogate's decision. 650 F.Supp. at 911 n. 7. We do not agree with this interpretation of *Bosch*. The *Erie* approach taken in *Bosch* assumes that state law, as announced by the state's highest court, is to be followed by both the state trial court and federal authorities. However, even assuming that the state trial court properly applied such state law, the *Bosch* court found that "when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should ... not be controlling." 387 U.S. at 465, 87 S.Ct. at 1782. Rather, federal authorities may make an independent examination of the state law as determined by the highest court of the state. *Id.* at 463, 87 S.Ct. at 1781-82. In this case, although the IRS is bound by the *factors* established by the New York Court of Appeals in *Freeman*, it is not bound by the Surrogate's application of these factors. Rather, according to *Bosch*, the Surrogate's ruling only need by given "proper regard" as one court's interpretation of applicable state law.

White and at least one amicus argue that the New York Court of Appeals may not overturn the Surrogate's factual determination of reasonableness, that as a practical matter that Court does not hear appeals from the Surrogate's determinations of fees, and that it has "delegated" its power to the Surrogate. While all this may be true, under New York law the Court of Appeals retains the authority to review a Surrogate's decision to ensure that it complies with New York law. That the Court rarely exercises its prerogative does not deprive the federal authorities of their jurisdiction to consider the same issues.

Subsequent to *Bosch*, we have stated that, even if proper regard is accorded to a state court's adjudication, "it would only

be as valid as its evidentiary base," and that "[w]e have not hesitated to disregard state court judgments affecting federal tax liability where the factual questions involved were not contested in state court, *see Lowe v. Commissioner,* 510 F.2d 479 (2d Cir.), *cert. denied,* 423 U.S. 827, 96 S.Ct. 44, 46 L.Ed.2d 44 (1975), or where a lower state court made an erroneous application of state law, *see Cheng Yih-Chun v. Federal Reserve Bank,* 442 F.2d 460 (2nd Cir.1971)." *United States v. Bosurgi,* 530 F.2d 1105, 1112 (2d Cir.1976). It follows that the IRS is entitled to make an initial assessment of the "proper regard" to be accorded a state trial court decree in a particular case.

We note that, at this summons enforcement stage, the validity of the Surrogate's decree is not at issue. Since the purpose of a summons is "not to accuse, but to inquire," *Bisceglia,* 420 U.S. at 146, 95 S.Ct. at 919, the IRS is merely seeking to inquire into the factors that have a bearing on the deductibility of White's fees—this is not the same as accusing the Surrogate of error. Thus, our discussion of *Bosch* and subsequent cases is intended solely to demonstrate that, contrary to White's claim, the IRS may indeed *inquire* under § 2053 into the allowability of White's fees under state law.

On the basis of the plain language of § 2053(a)(2) and the Supreme Court's reasoning in *Bosch*, we conclude that there is no *statutory* support for White's proposition that the Surrogate's decree is binding on the IRS in subsequent federal tax proceedings nor for the assertion that the statute bars the IRS from investigating the deductibility of White's attorney's fees. As previously mentioned, however, the district court found support for White's proposition primarily in the statute's associated regulation, Treas.Reg. § 20.2053-1(b)(2), which we consider next.

2. *Treasury Regulation § 20.2053-1(b)(2)*

Treasury Regulation § 20.2053-1(b)(2), which is entitled "Effect of Court Decree," provides in relevant part:

> The decision of a local court as to the amount and allowability under local law of a claim or administration expense will *ordinarily* be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed.... If the decree was rendered by consent, it will be accepted, *provided* the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits.... The decree will not be accepted if it is at variance with the law of the State ... (emphasis added).

The district court concluded in light of this regulation that (1) the Surrogate having passed upon the facts upon which deductibility depends, and (2) in the absence of a prima facie showing by the IRS that the Surrogate's decision was motivated by factors other than those upon which deductibility depends, "such as fraud, overreaching, or excessiveness by the attorney or the Surrogate," the IRS was bound by the Surrogate's decision. 650 F.Supp. at 909. The district court therefore accepted White's claim that an IRS investigation of the deductibility of his fees would be pointless and hence it found that the IRS summonses were not issued for a legitimate purpose.

We believe that the district court erred in concluding that this regulation precludes the IRS from investigating the deductibility of White's fees under state law. The regulation merely parallels and elaborates on its related statute, I.R.C. § 2053(a), and therefore, the principles discussed in *Bosch* are as applicable in the context of the regulation as they are in the statutory context. In stating that a local court decree "will not be accepted if it is at variance with the law of the State," the regulation, like the statute, when read in conjunction with *Bosch*, makes it clear that the IRS is entitled to make an independent assessment of applicable

state law as interpreted by the state's highest court. Contrary to the district court's conclusion, and by analogy to *Bosch*, the regulation does not preclude the IRS from independently assessing the deductibility of White's fees under state law.

Moreover, the regulation authorizes the IRS to determine, prior to acceptance of a local court decree, whether or not that decree is at variance with state law. For instance, a local court decree may be at variance with state law if, in the district court's words, "the Surrogate's decision was motivated by factors other than those upon which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate." The decree may also be at variance with state law if the local court did not pass on the facts upon which deductibility depends, or if the consent given was not a bona fide recognition of the validity of the claim—these are questions regarding the proper application of state law that the regulation itself sets forth as standards to determine when the IRS should accept a local court decree. Also, these standards are consistent with our prior statement that a state court decree "would only be as valid as its evidentiary base" and may be disregarded "where [it is determined that] a lower state court made an erroneous application of state law." *Bosurgi*, 530 F.2d at 1112.

From the language of the regulation, it is clear that, while the IRS may "ordinarily" accept a local court decree, it is not required to do so if the decree did not properly apply state law. Rather, the regulation permits the IRS to make an independent assessment of the deductibility of White's fees under state law and to assess the acceptability of the Surrogate's decree for federal tax purposes. Since neither I.R.C. § 2053 nor Treas.Reg. § 20.2053-1(b)(2) precludes the IRS from investigating the deductibility of White's fees under state law, we conclude that White has failed to meet his burden of disproving the existence of a legitimate tax determination purpose.

The district court erred in requiring, as a prerequisite for summons enforcement, that the IRS make a prima facie showing that the Surrogate's decision was motivated by impermissible factors "such as fraud, overreaching, or excessiveness by the attorney or the Surrogate." This requirement is virtually the same as that advanced by the taxpayer in *Powell*, namely, that the IRS must make an advance showing of probable cause to suspect fraud. In *Powell*, the Supreme Court rejected such a standard because "it might seriously hamper the Commissioner in carrying out investigations he thinks warranted, forcing him to litigate and prosecute appeals on the very subject which he desires to investigate." 379 U.S. at 54, 85 S.Ct. at 253. Since we believe that the district court's requirement would be equally likely to hamper the IRS in carrying out investigations it thinks are warranted, and has already forced the IRS to litigate and prosecute an appeal on the very subject it desires to investigate, we reject the district court's new standard for enforcement of summonses as an invalid restraint on the summons power of the IRS.

Finally, the district court prematurely considered and decided the issue of whether the Surrogate "passed on the facts upon which deductibility depends." As previously stated, at this summons enforcement stage, the validity of the Surrogate's decree is not at issue. Rather, the IRS seeks to *inquire* into the facts that bear on the deductibility of White's fees, and not to accuse the Surrogate of error. *See Bisceglia*, 420 U.S. at 146, 95 S.Ct. at 918-19. Indeed, as far as we know, no record evidence, as such, had been presented to the district court that would have enabled it to decide whether the Surrogate passed on the facts upon which deductibility depends. The post hoc letter from the Surrogate justifying its decision is not sufficient to eliminate inquiry into whether the Surrogate actually considered the appropriate facts.

The function of the district court and of this Court in an enforcement proceeding is not to test the final merits of the

claimed tax deduction, but to assess within the limits of *Powell* whether the IRS issued its summons for a legitimate tax determination purpose. We conclude from our review of I.R.C. § 2053 and its associated regulation that, contrary to White's claim, the IRS has a legitimate purpose in investigating the deductibility of his fees. We further conclude that White has failed to meet his "heavy" burden of disproving the existence of a legitimate tax determination for the IRS investigation.

3. *Relevance*

[4] In rebuttal to Serling's declaration of relevance, White argues that, even if the IRS may conduct an investigation, the only books and records that would be relevant to such an investigation are those of the Surrogate's Court, not his own. We disagree. In *United States v. Arthur Young & Co.*, 465 U.S. 805, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984), the Supreme Court stated:

> The language "may be" [in § 7602] reflects Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation.... The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until they are procured and scrutinized. As a tool of discovery, the § 7602 summons is critical to the investigation and enforcement function of the IRS; the Service therefore should not be required to establish that the documents it seeks are actually relevant in any technical, evidentiary sense.

Id. at 814, 104 S.Ct. at 1501 (emphasis in original). Clearly, White's books and records have "potential" relevance to an investigation to ascertain the deductibility of his fees under state law. The IRS need not establish more than that in a summons enforcement proceeding.

C. *Countervailing Policies*

[5] Thus far, White has failed to demonstrate that enforcement of the IRS summonses would constitute an abuse of the court's process. However, that does not automatically entitle the IRS to enforcement of its summonses; other considerations may bear on their enforceability. *See United States v. Arthur Young & Co.*, 677 F.2d 211, 219 (2d Cir.1982), *rev'd on other grounds*, 465 U.S. 805, 104 S.Ct. 1495, 79 L.Ed. 826 (1984). In appropriate circumstances, the broad latitude given the IRS in the use of its summons power may be restricted in light of "substantial countervailing policies." *Euge*, 444 U.S. at 711, 100 S.Ct. at 878. The district court herein found that, in addition to the relevant statutory and regulatory provisions, principles of comity and federalism argued against allowing the IRS to "second-guess" the Surrogate's decisions. 650 F.Supp. at 909. As examples of the respect accorded state judgments by federal courts, the district court cited, *inter alia*, the eleventh amendment, the full faith and credit statute and federal common law rules of preclusion.

In establishing what it considered to be the proper balance between federal and state interests in this proceeding, the district court relied on Justice Harlan's dissent in *Bosch*. *Id.* at 910. In *Bosch*, Justice Harlan stated:

> the federal interest requires only that the Commissioner be permitted to obtain from the federal courts a considered adjudication of the relevant state law issues in cases in which ... the state courts have not already provided such an adjudication. In turn, it may properly be assumed that the state court has had an opportunity to make, and has made, such an adjudication if, in a proceeding untainted by fraud, it has had the benefit of reasoned argument from parties holding genuinely inconsistent interests.

387 U.S. at 480-81, 87 S.Ct. at 1790-91. Relying on Justice Harlan's reasoning, the district court formulated a new standard

for enforcement of a summons: in order to "challenge" a decision of the Surrogate when the Surrogate has passed on the facts upon which deductibility depends, "the IRS must make a prima facie showing that the Surrogate's decision was motivated by factors other than those on which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate." 650 F.Supp. at 911. However, it is the reasoning of the majority in *Bosch*, and not that of the dissent, that is controlling.

[6] On the facts presented, we are not persuaded that federalism and comity constitute a "substantial countervailing policy" that would justify imposing a requirement upon the IRS to make an advance showing of factors "such as fraud, overreaching, or excessiveness by the attorney or the Surrogate" before granting enforcement of its summonses. Unquestionably, in proper circumstances, federal courts are bound to respect the considered judgment of state courts. However, the facts of this case do not implicate the eleventh amendment, full faith and credit, principles of collateral estoppel, or other doctrines arising from principles of federalism and comity; consequently, federal authorities are not bound to give preclusive effect to the Surrogate's decree.

Instead of substantial countervailing policies, we find in I.R.C. § 7602 "a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry." *Arthur Young*, 465 U.S. at 816, 104 S.Ct. at 1502 (emphasis in original). The Supreme court informs us that "In light of this explicit statement by the Legislative Branch, courts should be chary of recognizing exceptions to the broad summons authority of the IRS.... If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, and not this Court, to make." *Id.* at 816-17, 104 S.Ct. at 1502.

CONCLUSION

While we appreciate the concern of the amici and acknowledge that one may well wonder whether the IRS in the Buffalo area is allocating wisely the time and effort of its limited staff, nevertheless, in the absence of substantial countervailing policies, and in the absence of a showing that enforcement of the summonses would constitute an abuse of the court's process, we conclude that the IRS is entitled to enforcement of its summonses. Accordingly, we reverse and remand with directions that the district court grant the petition for enforcement.

JUDGMENT IN A CIVIL CASE

[Filed Jan 8, 10:32 AM '87, U.S. District Court, Rochester]

United States District Court
Western District of New York

UNITED STATES OF AMERICA, ET AL.
v.
JAMES M. WHITE, as attorney
for and as executor of the
ESTATE OF HELEN P. SMITH,
Deceased, CASE NUMBER MISC. CIV. 86-140T

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the respondent should not be compelled to obey the IRS summonses served upon him and dismissing this proceeding without prejudice.

JANUARY 8, 1987 — EDWARD P. GUETH JR.
Date — Clerk

[signature]
JANET E. MULLEY
(By) Deputy Clerk

650 FEDERAL SUPPLEMENT
UNITED STATES v. WHITE
Cite as 650 F.Supp. 904 (W.D.N.Y. 1987)
[904-912]

UNITED STATES of America, and James M. Serling, Estate Tax Attorney, Internal Revenue Service, Petitioners,

v.

James M. WHITE, as Attorney for and as the Executor of the Estate of Helen P. Smith, Deceased, Respondent.

Misc. No. CIV-86-140T.

United States District Court,
W.D. New York.

Jan. 7, 1987.

Federal Government petitioned for enforcement of two IRS summonses, requiring executor to substantiate deductions he claimed on federal estate tax return. The District Court, Telesca, J., held that IRS failed to show a "legitimate purpose" for requiring executor to substantiate deductions, so that Government's petition would be denied.

So ordered.

1. Internal Revenue 4508

Petition to enforce IRS summonses, and to compel executor of testator's estate to substantiate deductions he claimed on estate tax return, was not rendered moot by executor's payment of deficiency under protest. 26 U.S.C.A. §§ 7402(b), 7604(a).

2. Internal Revenue 4513

IRS failed to show a "legitimate purpose" for requiring executor to substantiate the deductions he claimed on federal estate tax return, so that petition to enforce IRS summonses would be denied, where deductions related to attorney fees claimed by executor as attorney for testator's estate, surrogate had determined that fees were reasonable based on same facts as Government would apply in deciding whether deduction would be allowed, and IRS failed to demonstrate fraud, overreaching or excessiveness by surrogate or executor. N.Y.McKinney's SCPA 2307; 26 U.S.C.A. §§ 2053(a), 7402(b), 7604(a).

3. Internal Revenue 4185

To challenge deductibility on federal estate tax return of attorney fees approved by surrogate and paid by executor, IRS must first make prima facie showing that surrogate's decision was motivated by factors other than those on which deductibility depends, such as fraud, overreaching, or excessiveness by attorney or surrogate. 26 U.S.C.A. § 2053(a).

4. Internal Revenue 3016

Federal laws dealing with taxation of decedents' estates must accommodate and yield to judicial determinations made under state law by state courts. 26 U.S.C.A. § 2053(a).

Jonathan W. Feldman, Asst. U.S. Atty., of Rochester, N.Y., Deborah S. Meland, Trial Atty., Tax Div., U.S. Dept. of Justice, Washington, D.C., for petitioners.

James M. White, Rochester, N.Y., for respondent.

DECISION and ORDER

TELESCA, District Judge.

INTRODUCTION

This action was brought on by the Government's petition for enforcement of two IRS summonses under 26 U.S.C. § 7402(b) and § 7604(a). An order to show cause was granted, Mr. White filed a Response, and the Government filed a Reply. The Monroe County Bar Association (MCBA) sought and was granted leave to file a brief *amicus curiae*, to which the Government has also filed a Response. As set forth below, I hold that Mr. White should not be compelled to obey the IRS summonses served upon him, and I dismiss this proceeding without prejudice.

FACTS

Helen P. Smith died on November 10, 1982, leaving a gross estate valued at over $455,000. Her will named respondent James M. White, Esq. as executor of the estate, and in his capacity as executor of the estate, Mr. White chose to act as the attorney for the estate as well. This is a practice permitted under New York Law. Surrogate's Court Procedure Act (SCPA) 2307. He promptly petitioned for probate of the will, and then waited the seven months required under SCPA § 1802 for any claims to be filed before the estate could be closed.

As required, Mr. White as executor filed his federal estate tax return (commonly referred to as the 706 Return). In that return, he claimed a deduction of $16,530 for his attorney's fees. He also

claimed a deduction of some $17,548.13 for the executor's commission to which he was entitled under SCPA § 2307.[1]

Although he had not received a "closing letter" from the IRS, Mr. White petitioned for judicial settlement of the estate.[2] Under SCPA § 2110, attorneys' fees can be fixed by an adversary proceeding[3], or by a judicial settlement if releases have been submitted from all legatees. In the Smith estate, Mr. White submitted releases from all nine[4] residuary legatees, one of whom was an experienced estates lawyer. The releases indicated the legatees' approval of Mr. White's accounting, which included $16,800 for his attorney's fee. After reviewing the accounting and the tax returns, on July 17, 1984, Surrogate Arnold F. Ciaccio granted a decree of judicial settlement of the Smith estate which had the

[1] SCPA 2307 provides in pertinent part that On the settlement of the account of any fiduciary ... the court must allow to him the reasonable and necessary expenses actually paid by him and if he be an attorney of this state and shall have rendered legal services in connection with his official duties, such compensation for his legal services as appear to the court to be just and reasonable and in addition thereto it must allow to the fiduciary for his services as fiduciary ... the following commissions....

[2] Under SCPA § 1804, an estate can be judicially settled before the State estate tax is final. Although § 1804 says nothing about Federal estate taxes, Treasury Regulations 20.2053-3(b) and (c) clearly contemplate the filing of the 706 return (and the concomitant deduction of any executor's commissions and attorney's fees) both before and after the decree of judicial settlement. *See also Hartwick College v. United States*, 801 F.2d 608, 613 n. 4 (2d Cir.1986).

[3] If such an adversary proceeding had taken place, Mr. White would have been required to file an affidavit detailing his efforts in this matter, under § 2230.29 of the Uniform Calendar and Practice Rules for Surrogate's Courts in the Fourth Department. As of January, 1986, a similar requirement was added by § 207.45 of the Uniform Rules for New York State Trial Courts. *See also, Estate of Gutchess*, 117 A.D.2d 852, 498 N.Y.S.2d 297 (3d Dept.1986), *app. denied*, 68 N.Y.2d 609, 501 N.E.2d 36 (1986) (administratrix of estate is "entitled to be fully apprised of the nature and extent of [the estate attorney's] services").

[4] Although Mr. White's Response (¶14) indicates that there were nine residual beneficiaries, the MCBA's brief indicates that there were twelve residuary legatees, all of whom submitted releases.

effect of settling the executor's accounting, approving the distribution of assets to those interested in the estate, and fixing and approving the executor's commissions and attorney's fees both of which were due to Mr. White. See SCPA 2307.

On August 7, 1984, petitioner Serling met with Mr. White to review the 706 return. On January 29, 1985, Mr. Serling wrote to Mr. White, stating that the Surrogate Court decree of judicial settlement did not preclude the necessity of his providing justification for the legal fees claimed. He stated that

> [e]ach case must be determined upon its own facts and circumstances taking into consideration the following factors:
>
> 1. Amount involved
> 2. Time abd [sic] effort of attorney
> 3. Seriousness of problems
> 4. Results obtained
> 5. Experience and ability of attorney
> 6. Length of administration.

He sought either Mr. White's time records or, if not available, then an itemized list of all legal work performed, time expended for each service and hourly rate charged.

Mr. White then wrote to Surrogate Ciaccio concerning the matter. Surrogate Ciaccio responded by letter to Mr. White dated February 25, 1985. That letter indicates that the executor's commission was fixed by statute, and that the attorney's fee was set:

> in keeping with our ordinary and customary guidelines which have been followed in this Court for several years. Moreover, it conforms to the criteria established by the Court of Appeals in this state as enunciated in *Matter of Freeman*, 34 NY 2d, 1 [355 N.Y.S.2d 336, 311 N.E.2d 480] and *Matter of Potts*, 241 NY 593 [150 N.E. 568]. I might say, parenthetically that the attorney fee approved was some $700 less than what would have been approved. I set these matters forth fully aware that you were both executor and attorney for the estate. In those instances, I personally have been careful to attempt to keep the fees for attorney-executors below a full commission. In this particular estate, you have complied. In conclusion, I state to you that a re-review of the file and the account submitted justify in every respect both the commission and fee approval. These are not done in an arbitrary fashion but rather as indicated following the application of the various criteria.

Mr. White forwarded this letter to Mr. Serling with a cover letter dated February 27, 1985.

Not satisfied with this explanation, on May 1, 1985, Mr. Serling issued an IRS summons to Mr. White as executor and attorney for the estate of Helen P. Smith which sought the production of any and all records and documents relating to the administration of the estate of Helen P. Smith, including records of Mr. White's activities both as attorney and as executor. Mr. White responded with a letter dated June 5, 1985, outlining his position and refusing to permit the IRS to examine the file. On December 16, 1985, Mr. Serling wrote to Mr. White, asking him to submit, in affidavit form, a detailed account of the duties he performed in his capacity as executor. By letter dated January 3, 1986, Mr. White responded that the amount of $17,548.13 was for the executor's commissions allowable under SCPA § 2307. On February 3, 1986, Mr. Serling issued another IRS summons to Mr. White, seeking any and all records relating to Mr. White's performance of the duties of executor of the estate of Helen P. Smith.

On July 16, 1986, the IRS issued a form Letter 902(DO), notifying Mr. White that it was assessing a deficiency of $5,754.19 against the estate of Helen P. Smith. Apart from an increase in the value of stocks and bonds in the estate (which was not con-

tested by Mr. White), the deficiency was based principally upon the disallowance of $17,176 in administration expenses, chiefly the entire amount ($16,530) of the attorney's fees claimed as a deduction. The IRS also determined that the claimed executor's commission of $17,450 should be corrected to $16,804. Mr. White states that he has paid the deficiency, with interest, and has filed a notice of claim for a refund. He also states that he does not contest the reduction in the executor's commission.

This enforcement proceeding was commenced August 12, 1986.

DISCUSSION

[1] At the outset, Mr. White argues that his payment of the deficiency renders this enforcement proceeding moot. However whether or not Mr. White has paid the deficiency, the issue remains whether the IRS is entitled to his time records so that it can independently determine the amount of any allowable deductions (notwithstanding the Surrogate's prior determination in a judicial proceeding). *See United States v. Gimbel,* 782 F.2d 89, 93 (7th Cir. 1986); *United States v. Roundtree*, 420 F.2d 845, 847 n. 3(5th Cir.1970); *see also Multistate Tax Commission v. United States Steel Corp.*, 714 F.2d 925 (9th Cir.1983), *and Marshall v. Stevens People and Friends For Freedom*, 669 F.2d 171, 174 (4th Cir. 1981), *cert. dismissed*, 455 U.S. 930, 102 S.Ct. 1297, 71 L.Ed.2d 639 (1982), *and cert. denied*, 455 U.S. 940, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982). *Cf. Carr v. United States*, 663 F.2d 59 (8th Cir.1981), *United States v. Kis*, 658 F.2d 526, 532-35 (7th Cir.1981), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982), *United States v. First American Bank*, 649 F.2d 288 (5th Cir.1981), *and United States v. Silva and Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir.1981) (actual compliance with an IRS summons *would* render an enforcement action

moot); *but cf. Gluck v. United States*, 771 F.2d 750, 753-54, n. 3 (3d Cir.1985) (*contra*). Accordingly, the petition will not be dismissed as moot.

To enforce a summons, the IRS must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 254-55, 13 L.Ed.2d 112 (1964); *United States v. MacKenzie*, 777 F.2d 811, 819 (2d Cir.1985), *cert. denied*, ____U.S.____, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986). For the reasons set forth below, I conclude that the IRS has not made the necessary showing that the investigation will be conducted pursuant to a legitimate purpose.

[2] The statute which governs the IRS's ability to determine the deductibility of estate administrative expenses is 26 U.S.C. § 2053(a), which permits the deduction of administrative expenses in "such amounts ... as are allowable by the laws of the jurisdiction ... under which the estate is being administered." An associated Treasury Regulation, § 20.2053-1(b)(2), sets forth the IRS policy in more detail:

> (2) *Effect of court decree*. The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed. For example, if the question before the court is whether a claim should be allowed, the decree allowing it will ordinarily be accepted as establishing the validity and amount of the claim. However, the decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of

> an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may be rebutted by proof to the contrary. If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant....

This statute and regulation were at issue in *Estate of Smith v. Commissioner,* 510 F.2d 479 (2d Cir.1975), *cert. denied,* 423 U.S. 827, 96 S.Ct. 44, 46 L.Ed.2d 44 (1975). In *Smith,* the Second Circuit affirmed a determination of the Tax Court that no more than $750,447.74 in sales commissions were "necessary" to liquidate the estate of a sculptor, even though the Surrogate's Court of Warren County, New York had approved the payment of almost $1.6 million in commissions. Citing the above-noted Treasury Regulation, the Second Circuit stated that

> [n]ormally, therefore, a Surrogate's court decree approving expenditures by an executor as proper administrative expenses under New York law will be controlling and will not raise questions concerning possible discrepancies between § 2053 of the Internal Revenue Code of 1954 and Treas.Reg. § 20.2053-3(d)(2).

Id. at 482.

Although in *Smith* the Commissioner and the Tax Court had each made a *de novo* inquiry into the factual necessity for the expenditures, they did so because the expenditures had not been undertaken on the estate's behalf, but rather on behalf of testamentary trusts. (Mr. Smith's will had contemplated a distribution of the sculptures in kind to the trusts for the benefit of his daughters.) *Estate of David Smith,* 57 T.C. 650 (1972). It was not a case in which the Commissioner and the Tax Court refused to follow

state law which by all appearances had been properly applied by the state court, as here. The Tax Court's determination in *Smith* that only about half the sales commissions were "necessary" either to preserve the estate or pay its debts was consistent with § 11-1.1 of the New York Estates, Powers and Trusts Law (EPTL) and Treas.Reg. 20.2053-3(d)(2). Compare Treas.Reg. 20.2053-3(c)(3).

The Government points to footnote 4 in *Smith,* in which the Second Circuit quoted from the Fifth Circuit's decision in *Pitner v. United States,* 388 F.2d 651 (1967):

> "[i]n the determination of deductibility under section 2053(a)(2), it is not enough that the deduction be allowable under state law. It is necessary as well that the deduction be for an 'administrative expense' within the meaning of that term as it is used in the statute, ***and that the amount sought to be deducted be reasonable under the circumstances. These are both questions of federal law*** and establish the outside limits for what may be considered allowable deductions under section 2053(a)(2)." 388 F.2d at 659.

(Emphasis added.) The Government argues from this that, in the Second Circuit, the question of the amount of a deduction is a federal question which is the proper subject of an IRS inquiry.

The Government has placed undue emphasis upon this footnote. The text which the footnote accompanies indicates that the Second Circuit had declined to adopt the Surrogate's computation of commissions because the interest of the federal government (in taxing the passage of property) had not been completely or accurately reflected in the State's interests (in supervising the fiduciary responsibilities of the executor). In particular, the Second Circuit noted that there was a question as to whether some of the expenses were in fact incurred for the benefit of the estate (in accordance with the general purpose of 26 U.S.C. § 2053), or instead were incurred for the benefit of the individual beneficiaries. The Court concluded that:

> [i]n such circumstances, the federal courts cannot be precluded from reexamining a lower state court's allowance of administration expenses to determine whether they were in fact necessary to carry out the administration of the estate or merely prudent or advisable in preserving the interests of the beneficiaries.

510 F.2d at 482-83 (citations omitted).

In this case, SCPA 2307 provides for the method of calcuating executor's commissions. Thus if the statute is followed the deduction claimed for executor's commissions is "reasonable" within the meaning of *Pitner*. The same statute specifically provides that the Surrogate allow to the executor, if he be an attorney, a fee "*as it appears to the Court* to be just and reasonable..." (emphasis added).

In this case, Surrogate Ciaccio had before him Mr. White's accounting, as well as the Federal and State estate tax returns, when he approved the amount of Mr. White's attorney fee as being "just and reasonable." As he stated in his February 25, 1985 letter, he applied the criteria from *Matter of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974), and *Matter of Potts*, 241 N.Y. 593, 150 N.E. 568 (1925), in setting the amount of Mr. White's attorney's fee. *Freeman* sets forth the following factors to be used in fixing an attorney's fee:

1. Time and labor required;
2. The difficulty of the questions involved;
3. The skill required to handle the problems presented;
4. The lawyer's experience, ability and reputation;
5. The amount involved and benefit resulting to the client from the services;
6. The customary fee charged by the Bar for similar services;

7. The contingency or certainty of compensation;
8. The results obtained;
9. The responsibility involved.

34 N.Y.2d at 9, 355 N.Y.S.2d 336, 311 N.E.2d 480. The six factors which Mr. Serling would have the IRS consider are all included among the factors listed in *Freeman*. Under Treas.Reg. 20.2053-1(b)(2), then, the Surrogate having passed upon the facts upon which deductibility depends, the decision of the Surrogate should be accepted.[5]

It appears that the IRS is claiming the right to second guess the decision of the Surrogate on commissions and attorneys' fees under *any* circumstances. Such a position not only represents a

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[5] The Monroe County Bar Association urges that I follow the holdings of *Estate of Park v. Commissioner of Internal Revenue*, 475 F.2d 673 (6th Cir.1973), and *Estate of Jenner v. Commissioner of Internal Revenue*, 577 F.2d 1100, 1106-07 (7th Cir.1978), and hold that, if a state probate court has determined that a particular expense is "necessary" to the administration of an estate, its determination would not be subject to review by the IRS. The MCBA argues that the Second Circuit effectively adopted this approach when it affirmed without opinion the decision in *Estate of Vatter v. Commissioner of Internal Revenue*, 65 T.C. 633 (1975), *aff'd.*, 556 F.2d 563 (1976). The MCBA also points out that this approach was adopted by the United States District Court in Nevada in *Bank of Nevada v. United States*, 80-2 U.S.T.C. ¶13,361 (1980). The Government argues that the MCBA misconstrues *Vatter*, and the *Park*, *Jenner*, and *Bank of Nevada* do not represent the law in this circuit as articulated in the *Smith* case.

I agree with the Government that *Smith*, not *Park*, *Jenner*, and *Bank of Nevada*, represents the law in this circuit. I also agree that the Tax Court in *Vatter* properly distinguished that case from *Smith*, because in *Vatter* the property in question had not been specifically devised or intended to be distributed in kind (so that the executrix was acting on behalf of the estate, not the beneficiaries, when she sold the property). Nevertheless, I believe that, under *Smith*, the IRS can review a probate court's determination that a particular expense is "necessary," but only if it first makes a showing that the probate court has, for some reason (such as fraud), not passed on the factors on which deductibility depends.

misreading of the *Smith* holding, but is also "destructive ... of the proper relationship between State and federal law...." *Commissioner v. Estate of Bosch,* 387 U.S. 456, 480, 87 S.Ct. 1776, 1790, 18 L.Ed.2d 886 (Harlan, J., dissenting) (1967).

The Surrogate's Court in New York State, and not the IRS or the U.S. District Court, is exclusively authorized by New York law to determine the appropriate award of attorneys fees in the probating of an estate. The factors that the IRS would have this Court consider are all factors which the Surrogate *does* consider under *Freeman* and *Potts.* State courts "have an especially strong interest and a well-developed competence" to adjudicate these matters, *Giardina v. Fontana,* 733 F.2d 1047 (2d Cir.1984); *see also, Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 31-32 (2d Cir.1986), so much so that the federal courts have created their own exception to diversity jurisdiction for probate matters. *Id.; see also Byers v. McAuley,* 149 U.S. 608, 13 S.Ct. 906, 37 L.Ed. 867 (1893); *In re Broderick's Will,* 21 Wall. (88 U.S.) 503, 22 L.Ed. 599 (1875); *Hook v. Payne,* 14 Wall. (81 U.S.) 252, 20 L.Ed. 887 (1872).

Respect for the considered judgment of state courts has been expressed by federal courts over the years for other reasons as well. This respect has been based upon the courts' sense of comity and federalism, *see, e.g., Webb v. Web,* 451 U.S. 493, 499-500, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981); *Juidice v. Vail,* 430 U.S. 327, 334-36, 97 S.Ct. 1211, 1216-17, 51 L.Ed.2d 376 (1977); *423 South Salina Street, Inc. v. City of Syracuse,* 724 F.2d 26, 27 (2d Cir.1983); a view of the states as "laboratories for social and economic experiements," *Johnson v. Louisiana,* 406 U.S. 356, 376, 92 S.Ct. 1620, 1636, 32 L.Ed.2d 152 (1972) (Blackmun, J., concurring); *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting); the Eleventh Amendment, *Pennhurst State School & Hosp. v. Haldermann,* 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67

(1984); the Full Faith and Credit statute (28 U.S.C. § 1738), *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2d Cir.1985); and federal common-law rules of preclusion. *University of Tennessee v. Elliott,* ____U.S.____, 106 S.Ct. 3220, 3224, 3226-27, 92 L.Ed.2d 635 (1986).[6]

Justice Black described the notion of comity and the principle of federalism in *Younger v. Harris,* 401 U.S. 37, 44-45, 91 S.Ct. 746, 750-51, 27 L.Ed.2d 669 (1971) as follows:

> ... that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly inter-

[6] The Full Faith and Credit Statute, and federal common-law rules of preclusion, apply to disputes between the same parties, or of which a party has at least had notice and an opportunity to fully present its claims. The Government has not raised the point that the IRS did not have notice of the judicial settlement proceeding or an opportunity to be heard therein, and this factor was not addressed by the Second Circuit in the *Smith* case. This is presumably because (as Justice Harlan noted in his dissent in the *Bosch* case) this is not a *res judicata* or collateral estoppel question. 387 U.S. at 475, 87 S.Ct. at 1787.

> fere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

In this case, the interests of the State (in determining how an attorney and an executor should be compensated for handling the probate of an estate) must be balanced against the interests of the IRS in enforcing the federal tax laws. I believe the proper balance was drawn by Justice Harlan in 1967:

> The interests of the federal treasury are essentially narrow here; they are entirely satisfied if a considered judgment is obtained from either a state or a federal court, after consideration of the pertinent materials, of the requirements of state law... [T]he federal interest requires only that the Commissioner be permitted to obtain from the federal courts a considered adjudication of the relevant state law issues in cases in which, for whatever reason, the state courts have not already provided such an adjudication. In turn, it may properly be assumed that the state court has had an opportunity to make, and has made, such an adjudication if, in a proceeding untainted by fraud, it has had the benefit of reasoned argument from parties holding genuinely inconsistent interests.

Commissioner v. Estate of Bosch, supra, 387 U.S. at 480-481, 87 S.Ct. at 1790.[7]

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[7] I recognize that Justice Harlan's opinion in *Bosch* was a dissenting opinion, and that the majority in *Bosch* held that a state trial court decision would not be binding on the IRS if the IRS had not been made a party. The majority opinion in *Bosch*, however, is distinguishable in at least two respects. First, *Bosch* involved a section of the Code for which the legislative history indicated only that "proper regard" should be given to a state probate court determination, and then only when entered by a court "in a bona fide adversary proceeding." 387 U.S. at 464, 87 S.Ct. at 1787. By contrast, the Code section and regulations at issue in this case specify that the probate court decision will ordinarily be accepted, even if rendered by consent, if the court passes upon the facts upon which deductibility depends. Second, unlike *Bosch*, there has been a determination of the relevant New York law not merely by the trial court, but also by the highest court in the state, in *Freeman* and *Potts*.

(Continued on next page)

[3] I hold that the IRS cannot second-guess the decision of the Surrogate when the Surrogate has passed upon the critical facts upon which deductibility depends. to challenge such a decision, the IRS must first make a *prima facie* showing that the Surrogate's decision was motivated by factors other than those on

Footnote 7 Continued

Moreover, the underlying substantive rule in this case is based on state law and this State's highest court is the best authority on its own law. 387 U.S. at 465, 87 S.Ct. at 1782. The issue is the reasonableness of an attorney's fee and the executor's commission claimed as deductions in an estate administration proceeding. Both fees are determined by State law. Both are allowed by State statute, SCPA 2307. The executor's commission is computed by a formula contained in that statute. The attorney's fee is controlled by a standard set forth by the holding of cases before the state's highest court, *Matter of Freeman* and *Matter of Potts.* As to the standard of review of a Surrogate's exercise of discretion in fixing attorney's fees, "the statute, the cases, and the treatises suggest that the fixation of fees ... [is] discretionary without further analysis [citations omitted]." *In Re Estate of Aaron,* 30 N.Y.2d 718, 720, 332 N.YS.2d 891, 283 N.E.2d 764 (1972). The Surrogate of Monroe County properly applied the statutory and caselaw, and thus his determination would not even have been reviewable in state court, under *Aaron.* By contrast, in *Bosch,* the Probate Court of Connecticut had to make a substantive determination of the term "marital deduction" as it applied in a federal estate tax statute. *See Gallagher v. Smith,* 223 F.2d 218, 222-23 (3d Cir.1955); *Estate of Bullock,* 19 T.C.M. 1080 (1960). Thus *Bosch* supplies no authority for the IRS to seek review of the Surrogate's Decision in federal court, particularly when it could not do so in state court.

In the instant case the issue is not one of interpreting federal law. It is a case of federal tax authorities refusing to accept the determination of a state court of a matter involved in state administration and clearly dealt with in state law. Thus, the *Bosch* case is distinguished from the instant case. In fact, under *Bosch,* because the underlying substantive rule involved is based on state law and the state's highest court has passed on the issue, then "federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." 387 U.S. at 465, 87 S.Ct. at 1782. The federal court then sits as a state court by application of the rule of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). *Id.*

which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate.[8] The IRS has not done so here.

I do not consider the fact that Mr. White acted as executor and attorney for the estate to be by itself evidence of fraud, overreaching, or excessiveness. That dual role is clearly permitted pursuant to SCPA 2307.[9] Whether or not that practice should continue is a matter for the New York State Legislature to decide, not Federal Court.[10]

CONCLUSION

For the reasons set forth above, the Government's motion for an order compelling enforcement of its summonses is denied, and this enforcement proceeding is dismissed. This dismissal is without prejudice, however, to a refiling by the Government should it determine that there is *prima facie* evidence of fraud,

[8] By analogy, New York statutory and case law is very clear on the circumstances (including fraud, newly discovered evidence, or clerical error) under which a Surrogate's order can be attacked. *See, e.g.,* SCPA § 209; *In re Estate of Chodikoff,* 54 Misc.2d 785, 786, 283 N.Y.S.2d 555 (Surr.Ct., Rensselaer County 1967); *In re Estate of Heller,* 33 Misc.2d 798, 226 N.Y.S.2d 260 (Surr. Ct., N.Y.County, 1962).

[9] An attorney/executor must differentiate between the services performed in each capacity when seeking court approval of fees. *See In re Tuttle's Will,* 4 A.D.2d 310, 164 N.Y.S.2d 573 (4th Dep't 1957), *aff'd,* 4 N.Y.2d 159, 173 N.Y.S.2d 279, 149 N.E.2d 715 (1988). The reported cases collected in the Supplementary Practice Commentaries to SCPA § 2110 (McKinneys) reflect what can fairly be described as a heightened scrutiny by Surrogates for fee applications from attorney/executors.

[10] The MCBA has also argued that, because the IRS's interpretation of the Treasury Regulations is inconsistent with the plain language of the Tax Code, the regulations are invalid. As set forth above, I believe the Regulations to be consistent with the Tax Code, and the IRS's interpretation of the Regulations to be incorrect. Accordingly, like the Second Circuit in *Smith,* 510 F.2d at 483, and the Tax Court in *Vatter,* 65 T.C. 633, fn. 5, I find it unnecessary to pass on whether Treas.Reg. § 20.2053-3 is invalid.

overreaching, or some other reason to believe that the Surrogate has not passed on the factors upon which deductibility depends in this case. That burden is upon the Government.

In the absence of such evidence, the IRS must respect a decision of a Surrogate setting the amount of the attorneys' fees and the executors' commissions set forth in a proceeding judicially settling the estate and which fees (on their face) are fully in accord with the requirements of the state law, particularly where that determination takes into account all of the factors which the IRS itself would consider. The fees, having been determined in a state court proceeding by the proper application of the relevant state law which is untainted by fraud, must be respected and accepted by this Court as well as the IRS.

[4] The administration of estates is an area traditionally reserved to the states, and federal laws dealing with the taxation of decedents' estates must accommodate and yield to judicial determinations made under state law by state courts. This is not a new doctrine. An important aspect of our Constitutional blueprint creates and respects certain spheres of authority, and leaves to the people of the stats in the Tenth Amendment those responsibilities and rights not committed to federal care.

ALL OF THE ABOVE IS SO ORDERED.

United States Court of Appeals
for the
Second Circuit

[United States Court of Appeals Seal: Filed Oct 06 1988]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of October, one thousand nine hundred and eighty-eight.

UNITED STATES OF AMERICA, and JAMES M. SERLING,
Estate Tax Attorney Internal Revenue Service,

Plaintiffs-Appellants,

v.

JAMES M. WHITE, as attorney for and as executor of
the ESTATE OF HLEN P. SMITH, deceased,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellee, James M. White, as attorney for and as executor of the Estate of Helen P. Smith, deceased,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk
[signature]

[Department of the Treasury]
[Internal Revenue Service letterhead]
SUMMONS
[Government Exhibit 1]

In the Matter of Estate of Helen P. Smith
Internal Revenue District of Buffalo. Periods Date of Death: November 10, 1982
The Commissioner of Internal Revenue
To James M. White, Executor and Attorney
At 624 Executive Office Building, Rochester, New York 14614

You are hereby summoned and required to appear before: James M. Serling, Attorney (Estate Tax), an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the Internal Revenue Laws concerning the period identified above for the periods shown.

Any and all records and documents relating to the administration of the Estate of Helen P. Smith including but not limited to the correspondence file of the executor and attorney, administrative records, records of purchase, sale and distribution of securities of the decedent, bank statements, checking records, any pleadings, stock brokerage statements, legal documents prepared in connection with the taxpayer, assignment or payments to the heirs and beneficiaries of the estate, any diary or other records maintained showing the attorney's and/or executor's activities, telephone calls, conferences or court appearances and documents prepared for all the state and federal tax returns filed for the estate.

Business address and telephone number of Internal Revenue Service officer named above: Internal Revenue Service, 100 State Street, Room 122, Rochester, New York 14614 (263-3170)
Place and time for appearance: at 100 State Street, Room 122, Rochester, New York 14614 on the 17th day of May, 1985 at 10:00 o'clock A.M. issued under authority of the Internal Revenue Code this 10th day of June, 1985

[James M. Serling signature]	Attorney (Estate Tax)
Signature of Issuing Officer	Title

Service of Summons, Notice
and Recordkeeper Certificates
(Pursuant to section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:
James M. White, Executor
Date: May 1, 1985 Time: 12:30 P.M.

How Summons Was Served
☒ I handed an attested copy of the summons to the person to whom it was directed.

Signature: [James M. Serling] Title: [Attorney (Estate Tax)]

This certificate is made to show compliance with section 7609, of Internal Revenue Code. This certificate applies only to summonses served on third party recordkeepers and not to summonses served on either third parties or any officer or employee of the person to whose identity the summons relates nor to summonses in aid of collection, to determine the identity of a person having a numbered account or similar arrangement or to determine whether or not records of the business transactions or affairs of an identified person have been made or kept.

I certify that within 3 days of serving the summons, I gave notice (Form 2039 D) to the person named below on the date in the manner indicated.

Date of Giving Notice: May 3, 1985
Name of Noticee: James M. White, Atty.
Address of Noticee (if mailed): 624 Executive Office Building, Rochester, New York 14614

How Notice Was Given:
☒ I gave notice by certified or registered mail to the last known address of the noticee.

Signature: [James M. Serling] Title: [Attorney (Estate Tax)]

[Department of the Treasury]
[Internal Revenue Service letterhead]
SUMMONS
[COPY]
[Government Exhibit 2]

In the Matter of Estate of Helen P. Smith
Internal Revenue District of Buffalo. Periods Date of Death: November 10, 1982
The Commissioner of Internal Revenue
To James M. White, Executor
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Any and all records and documents relating to the performance of the duties of executor of the Estate of Helen P. Smith, including, but not limited to, the collection and conservation of the decedent's assets, payment of all debts, estate and all income taxes, arrangement and payment of funeral and administration expenses, correspondence file of the executor, administrative records, records of purchase, sale and distribution of securities of the decedent, bank statements, checking records, stock brokerage statements, assignment or payments to the heirs and beneficiaries of the estate, diary or other records maintained showing executor's activities, telephone calls, conferences, all statements and schedules of accounts, court appearances, all documents

prepared for all state and federal tax returns filed for the estate and all records rendered to the estate pertaining to all legal services performed by James M. White, Attorney for the estate.

Business address and telephone number of Internal Revenue Service officer named above: Internal Revenue Service, 100 State Street, Room 122, Rochester, New York 14614 (263-3170)
Place and time for appearance: at 100 State Street, Room 122, Rochester, New York 14614 on the 4th day of March, 1986 at 9:30 o'clock A.M. issued under authority of the Internal Revenue Code this 3rd day of February, 1986

[James M. Serling signature]	Attorney (Estate Tax)
Signature of Issuing Officer	Title

Service of Summons, Notice
and Recordkeeper Certificates
(Pursuant to section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

James M. White, Executor

Date: February 3, 1986 Time: 4:45 P.M.

How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed.

[Monroe County Surrogate's Court letterhead]

February 25, 1985

James M. White, Esq.
624 Executive Office Building
Rochester, New York 14614

Re: Estate of Helen P. Smith
Your File No. E:E:1210:JMS

Dear Mr. White:

You have asked for a review of the commission and fee approval granted by this Court in a decree of judicial settlement made July 17, 1984. In reviewing the amount submitted at that time, I have noted that the total principal and interested accounted for are in excess of $455,000.

The commission for the executor was therein fixed by statute and was allowed in the amount of $17,548.13.

The attorney fee allowed in that proceeding was the sum of $16,800.

This is to advise that the fee set is in keeping with our ordinary and customary guidelines which have been followed in this Court for several years. Moreover, it conforms to the criteria established by the Court of Appeals in this state as enunciated in *Matter of Freeman*, 34 NY 2d, 1 and *Matter of Potts*, 241 NY 593. I might say, parenthetically that the attorney fee approved was some $700 less than what would have been approved. I set these matters forth fully aware that you were both executor and attorney for the estate. In those instances, I personally have been careful to attempt to keep the fees for attorney-executors below a full commission. In this particular estate, you have complied. In conclusion, I state to you that a re-review of the file and the account

submitted justify in every respect both the commission and fee approval. These are not done in an arbitrary fashion but rather as indicated following the application of the various criteria.

You are free to use this letter with respect to any taxing proceedings.

Very truly yours,
[signature]
ARNOLD F. CIACCIO
Monroe County Surrogate

OPPOSITION BRIEF

(4)

No. 88-928

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES M. WHITE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES M. SERLING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JAMES I.K. KNAPP
Acting Assistant Attorney General

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14pp

QUESTION PRESENTED

Whether the approval of executor's commissions and attorney's fees by a state probate court precludes the enforcement of an Internal Revenue Service summons seeking records relating to the administration of the estate for the purpose of determining the allowability of federal estate tax deductions claimed for such commissions and fees.

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OCTOBER TERM, 1988

No. 88-928

JAMES M. WHITE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES M. SERLING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 853 F.2d 107. The opinion of the district court (Pet. App. A26-A44) is reported at 650 F. Supp. 904.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1988. A petition for rehearing was denied on October 6, 1988 (Pet. App. A45). The petition for a writ of certiorari was filed on December 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was named as the executor of the estate of Helen P. Smith, and he also chose to act as the estate's

attorney. For his services, he claimed an executor's commission of $17,548 and an attorney's fee of $16,800, to be paid out of the gross estate of $455,000.[1] Petitioner obtained from the New York State Surrogate Court a decree of judicial settlement, which had the effect of fixing and approving his claimed executor's commissions and attorney's fees. This proceeding was not adversarial, and petitioner did not file an affidavit detailing his services as an attorney. Pet. App. A5-A6, A28-A30.

On the estate's federal estate tax return, petitioner deducted as administrative expenses an attorney's fee of $16,530 and an executor's commission of $17,450.[2] Respondent Serling, an Internal Revenue Service (IRS) attorney, was assigned to review the estate tax return. He informed petitioner that the decree of judicial settlement did not eliminate the need to justify the claimed deduction of legal fees, and he requested that petitioner provide the IRS with documentation of the work performed and time spent on the estate's legal work. In response, petitioner forwarded to respondent Serling a letter obtained from the Surrogate for use in the audit (see Pet. App. A53-A54), in which the Surrogate explained that the attorney's fee conformed to the criteria of reasonableness applicable under

[1] New York law provides that the executor's commission is determined by a formula based on the value of the gross estate. An allowable attorney's fee is compensation that is "just and reasonable." N.Y. Surr. Ct. Proc. Act § 2307 (McKinney 1967 & Supp. 1989). The New York Court of Appeals in *In re Freeman*, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S. 2d 336 (1974), has described the factors that are relevant in determining whether a claimed fee is "just and reasonable." See Pet. App. A36-A37.

[2] The record does not reveal why the amounts claimed as deductions on the estate tax return were slightly smaller than the amounts awarded by the Surrogate.

New York law and that he did not act arbitrarily in approving it. *Id.* at A6, A31.

Thereafter, respondent Serling issued two administrative summonses to petitioner (see Pet. App. A46-A47, A50-A51), requesting all records relating to the administration of the estate, including records of petitioner's activities as attorney and executor. Petitioner refused to comply with the summonses, relying on the Surrogate's prior approval of his attorney's fees. The government then brought this action in the United States District Court for the Western District of New York to enforce the summonses. *Id.* at A6-A7.[3]

2. The district court refused to enforce the summonses (Pet. App. A26-A44). The court held that "the IRS has not made the necessary showing that the investigation will be conducted pursuant to a legitimate purpose" (*id.* at A33). The court noted that the governing statute, Section 2053(a) of the Internal Revenue Code (26 U.S.C.), permits the deduction of administrative expenses allowable under state law, and the court relied upon the fact that the relevant Treasury regulation, 26 C.F.R. § 20.2053-1(b)(2), provides that a local court's determination to allow an administrative expense "will ordinarily be accepted [for federal estate tax purposes] if the court passes upon the facts upon which deductibility depends." The court reasoned that the IRS therefore could not ordinarily disallow the expenses approved by the Surrogate Court,

[3] The government also issued a notice of deficiency against the estate, in which it disallowed the claimed attorney's fees and reduced the claimed deduction for the executor's commission from $17,450 to $16,804. Petitioner did not contest the reduction in the executor's commission. After paying the deficiency, however, he sought a refund, contesting the disallowance of the attorney's fees deduction. That separate refund suit is pending in district court, and this case does not involve the refund claim. Pet. App. A6-A7.

and the court held that it would not enforce a summons designed to evalute the reasonableness of such approved expenses unless the IRS makes "a *prima facie* showing that the Surrogate's decision was motivated by factors other than those on which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate" (Pet. App. A42-A43).

3. The court of appeals reversed (Pet. App. A1-A24). The court held that the government had clearly met the requirements set forth in *United States* v. *Powell*, 379 U.S. 48 (1964), for the enforcement of a summons. Indeed, the court stated that the district court's additional requirement that the IRS make a *prima facie* showing that the Surrogate's decision was motivated by impermissible factors such as fraud was "virtually the same" as the proposition rejected by this Court in *Powell*, namely, that the IRS must make an advance showing of probable cause to suspect fraud in order to obtain enforcement of a summons designed to investigate fraud (Pet. App. A20). Because "the district court's requirement would be equally likely to hamper the IRS in carrying out investigations it thinks are warranted, and has already forced the IRS to litigate and prosecute an appeal on the very subject it desires to investigate," the court of appeals rejected the district court's additional requirement as "an invalid restraint on the summons power of the IRS" (*ibid.*).

The court of appeals also rejected the district court's conclusion that the statute and Treasury regulation preclude the IRS from investigating the deductibility of petitioner's fees. The court declared that the statute requires the IRS to apply state rules, but that the deductibility of the expenses remains a federal question that is not controlled by the determination of a state trial court (Pet. App. A14). And the court of appeals found that this

Court's decision in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967), supported its conclusion that "the Surrogate's decree is not conclusive and binding on the IRS" (Pet. App. A15). Correspondingly, the court concluded that Treas. Reg. § 20.2053-1(b)(2) "makes it clear that the IRS is entitled to make an independent assessment of applicable state law as interpreted by the state's highest court," and therefore it can "independently assess[] the deductibility of [petitioner's] fees under state law" (Pet. App. A18-A19). Thus, the court held that an inquiry into the basis for petitioner's claimed fees was a legitimate purpose for the issuance of the summonses. The court emphasized that "the validity of the Surrogate's decree is not at issue"; rather, the court's discussion was "intended solely to demonstrate that, contrary to [petitioner's] claim, the IRS may indeed *inquire* under § 2053 into the allowability of [petitioner's] fees under state law" (*id.* at A17).

ARGUMENT

Petitioner contends that the court of appeals erred in directing the district court to enforce the summonses. The court of appeals' decision, however, is correct, and does not conflict with any decision of this Court or of another court of appeals. Indeed, the decision below is virtually compelled by summons enforcement principles well established by decisions of this Court. Accordingly, further review is not warranted.

1. It must be emphasized that, despite petitioner's statement of the question presented (Pet. i; see also Pet. 19-25), the issue in this case concerns only the validity of IRS investigative summonses. It has been well established by this Court that a summons must be enforced when it has been issued by the IRS in good faith to further a legitimate tax investigation—specifically, if the IRS shows

that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." See, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). There is no doubt that the Commissioner followed the prescribed administrative steps, that he did not possess the requested information, and that the summonses were not issued for any purpose other than the legitimate one of determining the tax liability of the estate. Hence the summonses should have been enforced.

The essence of petitioner's contention is the assertion that the IRS is "bound under section 2053(a) of the Internal Revenue Code to accept the state court's determination as to the amount of a reasonable attorney's fee" (Pet. 9). If so, petitioner reasons, the documents requested by the summonses are not relevant to a legitimate tax investigation purpose because, regardless of the outcome of the investigation, the IRS is powerless to disallow a claimed deduction for fees that have been approved by the Surrogate. But the premise of petitioner's contention is manifestly erroneous. Section 2053 directs the IRS to apply state rules in determining whether fees are "allowable," but the statute does not purport to give preclusive effect to the decree of a state trial court. In implementing this statute, Treas. Reg. § 20.2053-1(b)(2) states only that a local lower court decree "will *ordinarily* be accepted [for federal estate tax purposes] if the court passes upon the facts upon which deductibility depends" (emphasis added), and it flatly declares that the decree of a lower state court "will not be accepted if it is at variance with the law of the State." Accordingly, even the district court recognized that the IRS is not necessarily bound to allow a deduction in the amount approved by the Surrogate, but

instead may depart from the state court decree in some circumstances (see Pet. App. A42-A43). Thus, even under the district court's reading of the statute, the IRS must be permitted to inquire into the circumstances underlying the claimed deduction, and therefore the summonses in this case were issued for a legitimate purpose and satisfy the *Powell* criteria.[4]

In fact, the circumstances under which the IRS may depart from the determination by the Surrogate are broader than those recognized by the district court. In *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967), this Court held that, where a federal estate tax deduction depended upon a question of state law, the federal court was not bound by the determination of a state trial court. Rather, the federal court was required to conduct an "independent examination of the state law as determined by the highest court of the State" and not to follow the state trial court's determination if it did not accord with the principles promulgated by the highest court of the State (*id.* at 463). Thus, the Court concluded that, "when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should * * * not be controlling" (*id.* at 465). The principles

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[4] The district court's holding that the summons should not be enforced unless the IRS can make a *prima facie* showing that there exist circumstances that would justify departing from the Surrogate's decree was correctly rejected by the court of appeals as plainly inconsistent with *Powell*. See Pet. App. A20. Just as the IRS in *Powell* did not have to demonstrate fraud in order to obtain enforcement of a summons in a case where the statute of limitations would have expired if there were no fraud, so too the IRS does not have to show the existence of the circumstances that would justify departing from the Surrogate's decree before it undertakes its investigation. The IRS is entitled to make an inquiry, and to use its summons power for that purpose, in order to determine if such circumstances exist.

of *Bosch* indicate that the IRS and the federal courts—in considering the estate's federal estate tax liability—are entitled to make an independent assessment of whether the fees approved by the Surrogate were in fact "just and reasonable" under New York law as interpreted by the New York Court of Appeals.[5]

Petitioner argues (Pet. 13-16) that *Bosch* should not apply in this context. First, petitioner argues that *Bosch* applies only when the case concerns a rule of law that has not been settled by the highest court of the state, and that the federal courts must follow a state trial court's ruling when that court is merely applying an established rule of state law to a particular set of facts. But there is no indication in *Bosch* that the decision should be so limited, and, in fact, the court of appeals opinions in the two cases that were before the Court in *Bosch* do not indicate whether the relevant state law rule had been settled at that time by the State's highest court. See *Commissioner* v. *Estate of Bosch*, 363 F.2d 1009 (2d Cir. 1966) (validity of release of general power of appointment), rev'd, 387 U.S. 456 (1967); *Second Nat'l Bank* v. *United States*, 351 F.2d 489 (2d Cir. 1965) (whether will negated application of state

[5] Petitioner objects (Pet. 19) that the summoned materials "are not even potentially relevant" to an application of New York law because of their alleged "emphasis on 'time spent' and 'hourly rates.'" But the IRS is not seeking information only with respect to the time petitioner spent performing legal work, which is, in any event, one of the factors that the New York Court of Appeals has deemed relevant to reasonableness. The summonses also seek material relating to petitioner's work as attorney that would establish the work he performed, the difficulty of the questions presented, and the results obtained, all of which are recognized under New York law as relevant to the reasonableness of the fees. See *In re Freeman, supra*; Pet. App. A36-A37.

proration statute), aff'd, 387 U.S. 456 (1967).[6] Second, petitioner argues (Pet. 15-16) that, even under the principles of *Bosch*, the federal courts must treat the Surrogate's approval as conclusive because, in practice, the New York Court of Appeals almost never reviews the legitimacy of fees awarded by the Surrogate. As the court of appeals found (Pet. App. A16), however, it is undisputed that the New York appellate courts have the *authority* to review the Surrogate's determination to ensure that it complies with New York law (see, *e.g.*, *In re Brehm*, 37 App. Div. 2d 95, 97, 322 N.Y.S.2d 287, 290 (4th Dept. 1971); *In re Estate of Roth*, 29 App. Div. 2d 941, 289 N.Y.S.2d 575 (1st Dept. 1968)), and therefore the Surrogate's determination is not a conclusive statement of state law; "[t]hat the [New York] Court [of Appeals] rarely exercises its prerogative does not deprive the federal authorities of their jurisdiction to consider the same issues" (Pet. App. A16).

In any event, the degree of deference that is due the Surrogate's determination is not an issue in this proceeding, which does not even raise the question whether the Surrogate's decision in this case should be followed. Rather, the only issue in this case is whether the IRS has the right to *inquire* into whether a federal estate tax deduction should be allowed for the claimed fees. Since, as even the district court acknowledged, the IRS is not required to accept the Surrogate's determination in all circumstances, there is no basis for denying enforcement of the sum-

[6] Indeed, Justice Harlan, in his dissent in *Bosch*, characterized the Court's decision as "requir[ing] federal courts to examine for themselves, absent a judgment by the State's highest court, the content *in each case* of the pertinent state law" (387 U.S. at 479 (emphasis added)). See also *id.* at 480; *Magavern* v. *United States*, 550 F.2d 797, 800-801 (2d Cir.), cert. denied, 434 U.S. 826 (1977).

monses and preventing the IRS from investigating the relevant circumstances. As this Court pointed out in *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814 (1984), the statutory authorization to summon any records "which may be relevant" (26 U.S.C. 7602(a)(1)) "reflects Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation * * *: the Service can hardly be expected to know whether such data will in fact be relevant until they are procured and scrutinized."[7]

[7] For this reason, petitioner is mistaken in his assertion (Pet. 9-12) that the decision below conflicts with *Estate of Jenner* v. *Commissioner*, 577 F.2d 1100 (7th Cir. 1978), and *Estate of Park* v. *Commissioner*, 475 F.2d 673 (6th Cir. 1973). Neither of those cases involved the enforcement of a summons; rather, they addressed the merits of whether a particular state trial court decision should be followed in determining the validity of an estate tax deduction—the issue that is presented in petitioner's refund suit (see note 3, *supra*), but not in this case. Moreover, neither of those cases held that a federal court must follow a state trial court's determination even if the federal court concludes that that determination does not accord with state law as interpreted by the highest court of the state. To the contrary, in *Jenner* the court found that there was "ample evidence in the record to support the state probate court's implicit finding" that the claimed administrative expenses were allowable under state law, and therefore the court of appeals did not remand the case to the Tax Court to consider that issue. 577 F.2d at 1106-1107. In *Park*, the court noted that the claimed expenses were "admittedly allowable under Michigan law" (475 F.2d at 676).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1989

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AMICUS CURIAE

BRIEF

(3)

Supreme Court, U.S.
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No. 88-928

IN THE

Supreme Court of the United States

October Term, 1988

JAMES M. WHITE, as attorney for and as the Executor of the Estate of HELEN P. SMITH, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA, and JAMES M. SERLING, Estate Tax Attorney Internal Revenue Service,

Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUBMITTED BY THE NEW YORK STATE BAR ASSOCIATION, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE AMERICAN COLLEGE OF PROBATE COUNSEL

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Question Presented for Review

If a local probate court (in the exercise of its discretion granted under applicable state law as determined by the state's highest court) specifically allows an attorney's fee for services to an estate, is the Internal Revenue Service then entitled to make an independent *de novo* assessment of the validity of the fee under state law to determine its deductibility for Federal estate tax purposes?

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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-928

JAMES M. WHITE, as attorney for and as the Executor of the Estate of HELEN P. SMITH, Deceased,

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vs.

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Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUBMITTED BY THE NEW YORK STATE BAR ASSOCIATION, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE AMERICAN COLLEGE OF PROBATE COUNSEL

Introduction

The New York State Bar Association, the Association of the Bar of the City of New York and The American College of Probate Counsel[1] ("Bar Organizations") respectfully submit this brief in support of the prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 2, 1988.

---

[1] The Bar Organizations have obtained permission from the Solicitor General and from Mr. White to file this *amicus curiae* brief.

The New York State Bar Association is the largest voluntary bar association in the United States, with roughly 48,000 members. Its policy is to submit *amicus curiae* briefs only in significant appellate cases where authorized by the Executive Committee of the Association.

The Association of the Bar of the City of New York has a membership of approximately 18,000. Its policy also is to file *amicus curiae* briefs only if authorized by the Association's President.

The American College of Probate Counsel is a professional association of lawyers with a current membership consisting of over 2,600 Fellows from throughout the United States who have been elected to membership by their peers on the basis of their professional reputation and their demonstrated exceptional skill and ability in probate, trust or estate planning law, and who have made substantial contributions to these fields through lecturing, writing, teaching and bar activities. The policy of the College is to file *amicus curiae* briefs only on matters "of special significance to the legal profession or the public."

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 853 F.2d 107 (2d Cir. 1988). The opinion of the United States District Court for the Western District of New York is reported at 650 F. Supp. 904 (W.D. N.Y. 1987).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was rendered and entered on August 2, 1988. A petition for rehearing *in banc* was denied by Order entered on October 6, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Regulations

I.R.C. §2053(a); Treasury Regulation §20.2053-3(a) and (c); Treasury Regulation §20.2053-1(b)(2); I.R.C. §6110(j)(3); I.R.C. §7602(a); New York Constitution, Article 6, Section 3(a); New York Surrogate's Court Procedure Act §§2110 and 2307(1); California Probate Code §910. The text of these provisions is set forth in Appendix A.

Statement of the Case

I. Statement of the Facts

The Bar Organizations adopt the statement of the case and the facts set forth in the Petition for a Writ of Certiorari and in the opinion of the District Court.

II. Proceedings Below

An action was commenced by the Government by a petition filed in the United States District Court for the Western District of New York for enforcement of two Internal Revenue Service summonses. An order to show cause was granted, Mr. White filed a Response, and the Government filed a Reply. The Service did not contend that the Surrogate's decision was the result of fraud or overreaching or was contrary to New York law or that the New York Court of Appeals would overrule the Surrogate's decision. The United States District Court held in its decision and order, dated January 7, 1987, that the Government had failed to make the required showing and denied enforcement.

The United States of America and James M. Serling, an estate tax attorney in the Internal Revenue Service, appealed from the judgment of the United States District Court to the United States Court of Appeals for the Second Circuit, which, by its decision dated August 2, 1988, reversed and remanded with directions that the District Court grant the petition for enforcement.

James M. White then petitioned the United States Court of Appeals for the Second Circuit for a rehearing, which was denied on October 6, 1988.

Interests of the Bar Organizations

The Bar Organizations are interested in this proceeding, not to sustain the deductibility of a particular attorney's fee under I.R.C. §2053(a) but rather to preserve an orderly system for the administration of decedents' estates. The position of the Internal Revenue Service in this particular case is symptomatic of an apparent recent campaign to challenge the deductibility of attorneys' fees for services to estates, based upon the Service's misreading and misapplication of state and federal law that has long been settled. Moreover, the decision of the United States Court of Appeals for the Second Circuit is in conflict with decisions rendered by the United States Court of Appeals for the Seventh Circuit. As a consequence, the decisions of the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Seventh Circuit result in non-uniform application of Federal tax law.

Mr. White has a pending claim for refund in the District Court on the merits of the claimed deduction. The Government has demanded a jury trial. Thus as a result of the judgment of the Second Circuit Court of Appeals, the Federal court system is now to relitigate a matter that has already been decided by the appropriate state court—the allowability of the attorney's fee for services to an estate in accordance with applicable New York law.

In the view of the Bar Organizations, this result (1) imposes an unjustified burden upon the orderly administration of estates, (2) was not intended by Congress when it authorized a Federal estate tax deduction for administration expenses allowable by state law, and (3) was not contemplated by this Court when it decided *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals for the Second Circuit Contradicts Prior Decisions of the Court of Appeals for the Seventh Circuit and Results in Non-Uniform Application of Federal Tax Law.

The decision of the Court of Appeals for the Second Circuit directly contradicts the only other Circuit Court of Appeals authority which the Internal Revenue Service has acknowledged is in point[2] (although dealing with administration expenses other than attorney's fees), the decisions of the Seventh Circuit in *Estate of Jenner v. Commissioner*, 577 F.2d 1100 (7th Cir. 1978), and *Ballance v. United States*, 347 F.2d 419 (7th Cir. 1965).[3] In those decisions, the Seventh Circuit has indicated that a determination of reasonableness of administration expenses for purposes of determining the deductibility under I.R.C. §2053(a)(2) under a separate Federal standard would not be a factor in allowing a deduction under that section. Indeed, as indicated above, the Internal Revenue Service itself has acknowledged in National Office Technical Advice Memoranda 8838009 and 8636100[4] that the Service will accept the amount of

[2] The Service made this acknowledgment in National Office Technical Memorandum 8838009 and 8636100 more fully discussed in the text below.

[3] Although not yet addressed by the Internal Revenue Service in any announcement, it appears that the decision closest on point in the Sixth Circuit is consistent with those in the Seventh Circuit. *See Estate of Park v. Commissioner*, 475 F.2d 673 (6th Cir. 1973). *But see Pitner v. United States*, 388 F.2d 651 (5th Cir. 1967); *Estate of Smith v. Commissioner*, 510 F.2d 479 (2d Cir. 1975); and *Hibernia Bank v. United States*, 581 F.2d 741 (9th Cir. 1978).

[4] Although under I.R.C. §6110(j)(3) National Office Technical Advice Memoranda may not be cited or used as precedents, they are often indicative of the Service's position on an issue, and indeed, in this case, they instruct the Service's agents not to challenge the amount of attorney's fees fixed by a local probate court within the Seventh Circuit. In Technical Advice Memorandum 8838009, the Service takes the position except in the Seventh Circuit that the reasonableness of an amount sought to be deducted is a question of Federal law, citing *Pitner, Smith* and *Hibernia Bank*.

attorneys' fees determined by a local probate court within the Seventh Circuit as the reasonable amount for purposes of I.R.C. §2053.

I.R.C. §2053 provides that the value of the taxable estate is to be determined by deducting from the value of the gross estate such amounts for administration expenses "as are allowable by the laws of the jurisdiction . . . under which the estate is being administered."

Treas. Reg. §20.2053-3(a) expressly provides that for purposes of I.R.C. §2053, "Administration expenses include . . . attorney's fees . . . ." The Treasury Regulations authorize an executor to take an estate tax deduction for "such an amount of attorney's fees as has actually been paid." Treas. Reg. §20.2053-3(c). Finally, the Treasury Regulations provide that the Internal Revenue Service will ordinarily accept the amount of attorney's fee actually approved by a local probate court as the amount allowable as the deduction under I.R.C. §2053:

> *Effect of court decree.* The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends . . . If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant. [Treas. Reg. §20.2053-1(b)(2).]

The central issue in the case is whether the Service may attempt to disallow all or any portion of the amount of attorney's fee set by a Surrogate's Court of the State of New York, and in fact paid, in the absence of a showing of fraud overreaching or some other

reason to believe that the Surrogate had not passed upon the factors upon which allowability of an attorney's fee is determined under applicable New York law. The United States Courts of Appeals for both the Sixth and Seventh Circuits have interpreted I.R.C. §2053(a) to mean that if a state court allows an expense to be charged to an estate, the amount of that expense is necessarily deductible under Federal estate tax law. *See Estate of Park v. Commissioner,* 475 F.2d 673 (6th Cir. 1973) and *Estate of Jenner v. Commissioner,* 577 F.2d 1100 (7th Cir. 1978) and *Ballance v. United States,* 347 F.2d 419 (7th Cir. 1965).

Nationwide uniformity in the application of Federal tax law is a matter of great importance. This Court should act to resolve the direct conflict between the decisions of the Circuit Courts of Appeals.

II. If the Conflict Between the Circuits Is Not Resolved, a Substantial Volume of Major Tax Litigation Will Result and Uncertainty Over the Federal Tax Law Will Extend for a Great Period of Time.

The Bar Organizations are aware that the particular case before this Court is symptomatic of an apparent recent campaign to challenge the deductibility of attorneys' fees for services to estates. This new campaign by the Service, if continued, can disrupt the orderly administration of estates and involve the Federal courts unnecessarily and inappropriately in matters primarily of state concern.

It has come to the attention of the Bar Organizations that within the past five years Federal estate tax examiners have begun routinely to challenge the deductibility of attorneys' fees as administration expenses. The promulgation by the Internal Revenue Service of National Office Technical Advice Memoranda 8636100 and 8838009 is indicative of the extent of that campaign.

This audit practice has on occasion involved:

1. Questioning fees that are routine in amount, that have already been passed upon and specifically approved by the local Surrogate's Court or that would clearly be approved under local guidelines although not presented for approval by beneficiaries or by the Surrogate's Court.

2. Demanding "line-by-line" time records from attorneys, and commencing enforcement measures if the records are not supplied voluntarily.

3. Challenging deductibility of such fees because the Service asserts that the attorney's time would not support the fees, despite the fact that under controlling New York law time is only one of many factors to be considered in determining a fee for services to an estate. *Matter of Freeman*, 34 N.Y.2d 1 (1974).

As the District Court below noted, "It appears that the I.R.S. is claiming the right to second guess the decision of the Surrogate on commissions and attorneys' fees under *any* circumstances." *United States v. White, supra*, at 909. (Emphasis in original.)

The Bar Organizations contest that claim of the Internal Revenue Service, as not only contrary to New York law and practice, the Internal Revenue Code and Treasury Regulations, as well as decisions of the Federal courts, but also as contrary to the public interest in an orderly system of estate administration, ultimately regulated by impartial state probate courts rather than the Federal taxing authority.

In any event, where the Surrogate and the IRS differ as to the proper amount of attorneys' fees, an unnecessary and inappropriate volume of litigation in the Federal courts will inevitably ensue.

III. The Second Circuit Incorrectly Held that the Internal Revenue Service Is Entitled to Make a *De Novo* Inquiry as to the Reasonableness of an Attorney's Fee Approved by the Surrogate in Accordance with New York Law.

A. The Internal Revenue Service Has No Legitimate Purpose for Its Investigation.

The Internal Revenue Service has failed to show that its investigation is conducted pursuant to a legitimate purpose because, regardless of the information it acquires, it is bound by the Surrogate's Court decision. Under I.R.C. §7602, the Internal Revenue Service may issue summonses in connection with tax matters. To enforce a summons, however, the Internal Revenue Service must show, among other things, that the investigation will be conducted pursuant to a legitimate purpose, and that the inquiry may be relevant to the purpose. *United States v. Powell*, 379 U.S. 48, 57-58 (1964). The Service contends it needs the information in this case to determine the amount allowable under I.R.C. §2053(a) as the estate tax deduction for attorney's fees. If the Internal Revenue Service must accept the attorney's fee allowed by the Surrogate's Court for services rendered to the estate as the amount allowable in accordance with applicable local law and practice, then there is no legitimate purpose for the investigation.

B. Under the Internal Revenue Code and the Treasury Regulations, the Internal Revenue Service Is Bound by the Surrogate's Decree Allowing the Amount of Attorney's Fees.

According to I.R.C. §2053(a), administration expenses, including attorneys' fees, are deductible for Federal estate tax purposes if "allowable" by the laws of the jurisdiction where the estate is being administered. New York Surrogate's Court Procedure Act §2110 designates the New York Surrogate's Court, not the Internal Revenue Service, as the proper entity to determine what is allowable under New York law, in accordance with the

criteria set forth by the highest court of the State, the New York Court of Appeals, in *Matter of Freeman*, 34 N.Y.2d 1 (1974).

In addition, the New York Court of Appeals in *Freeman* has ruled that under New York State law it is the Surrogate's Court which makes the *factual* determination in particular cases in accordance with relevant factors announced by the Court of Appeals.

Of particular significance, the Court of Appeals in *Freeman* held that the Surrogate's independent determination of the reasonableness of the fee was a finding of *fact* which the Court of Appeals was "powerless" to overturn (34 N.Y.2d at 10). *See also Matter of Potts*, 213 App. Div. 59 (4th Dep't 1925), *aff'd* 241 N.Y. 593, noting that "... a presumption exists in favor of the Surrogate's decision, the same as in favor of a general verdict of a jury." *Matter of Potts*, 213 App. Div. at 63, *supra*. Moreover, Article 6 Section 3(a) of the New York Constitution provides that the jurisdiction of the Court of Appeals is limited to the review of questions of law, except in limited circumstances not applicable to this case.

The allowance of the deductibility of attorney's fees for services rendered to an estate is governed by I.R.C. §2053(a), which provides, in part:

> For purposes of the [estate] tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—
>
> ...
>
> (2) for administration expenses,
>
> ...
>
> as are allowable by the laws of the jurisdiction ... under which the estate is being administered.

While apparently acknowledging that it is bound to apply New York State law in determining the allowance of the attorney's fees for estate tax purposes, the Internal Revenue Service seems to believe it is permitted to make a *de novo* determination of the amount allowable under New York State law and is not bound to follow the determination of the Surrogate's Court having jurisdiction over the estate as to the proper amount allowable as fees under New York law. Nonetheless, the Treasury Department's own estate tax regulations demonstrate that the allowance of attorney's fees as determined by a local state law should be accepted as the amount allowable for Federal estate tax purposes.

> (c) *Attorney's fees.* (1) The executor or administrator, in filing the estate tax return, may adopt such an amount of attorney's fees as has actually been paid, or an amount which at the time of the filing may reasonably be expected to be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will, nevertheless, be allowed, if the district director is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require. [Treas. Reg. §20.2053-3(c)(1)].
>
> * * *
>
> *Effect of Court Decree.* The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts which deductibility depends .... If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a

> gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant. [Treas. Reg. §20.2053-1(b)(2)].

The Government has acknowledged that its ability, under the foregoing Treasury Regulations, to challenge the allowance of an attorney's fee is greatly limited. In the Government's Action on Decision CC-1978-49 (October 6, 1977) involving *First National Bank of Nevada v. United States*, 40 A.F.T.R. 2d 77-6262 (D. Nev. 1977), the Government stated:

> Although there is insufficient basis in Nevada law for appealing the District Court's decision as to what fees are allowable under the laws of that state, it remains the position of the Service that a Section 2053 deduction for attorney's fees is open to challenge by the Service where decisions by the highest court of the state support taking the position that such fees would not be "allowable".

As will be discussed more fully below, because the decision of the Surrogate's Court in fixing the amount of attorney's fee is non-reviewable as a matter of state law, except under the same criteria as reviewing a general verdict of a jury, there is no decision by the New York Court of Appeals that would support taking the position on the facts of this case that the amount of the fee set by the Surrogate in this case would be changed by a reviewing court.

In Action on Decision CC-1982-076 (October 15, 1982), involving *Bank of Nevada v. United States*, 46 A.F.T.R. 80-6155 (D. Nev. 1980), the Government stated:

> While we do not interpret the regulations so narrowly as to require Service acceptance of an award made by a lower state court decree, neither do we read it to endorse an inquiry under any and all instances of court awarded fees. The provision in

> Treas. Reg. 20.2053-1((b)(2) for ordinarily accepting the probate court's decree seems to require that in the absence of unusual circumstances, the degree be followed.
>
> While we disagree with the holding with respect to the scope of the district director's discretion, the outcome here is essentially correct. A fee of five percent of the estate is not unreasonable. There is no evidence that the fees benefited only the estate distributees. While the fee may be exorbitant in view of the work performed, we do not believe the facts are so egregious as to justify disregarding the court decree. Furthermore, we are not convinced that upon review of this award, the Supreme Court of Nevada would rule it contrary to state law.

Hence, under the Service's own interpretation of the Treasury Regulations, it is bound by the determination of the Surrogate's Court.

C. Under the Controlling Decision of this Court, the Internal Revenue Service Is Bound by the Surrogate's Decree Allowing the Amount of Attorney's Fees.

The decision of the United States Court of Appeals for the Second Circuit[5] turned on its interpretation of *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). The Second Circuit interpreted *Bosch* to mean that the Internal Revenue Service need not abide by *any* determination at a trial level state court unless that decision had been appealed to and affirmed by the state's highest court. The holding of this Court in *Bosch* was otherwise. This Court in *Bosch* held that the Internal Revenue Service is not bound by a lower court's

[5] The decision of the United States Court of Appeals for the Second Circuit below is contrary to the decisions of several other federal courts. *See, e.g., First National Bank of Nevada v. United States, supra; Bank of Nevada v. United States, supra; Estate of Park v. Commissioner, supra; Estate of Jenner v. Commissioner, supra;* and *Ballance v. United States, supra.*

pronouncement of a *rule of law* of the state but would be bound by the law as announced by the highest court of the state. *Commissioner v. Estate of Bosch*, 387 U.S. at 465, *supra*. However, unlike *Bosch*, the present case does not involve any unsettled state law. The New York Court of Appeals has set forth in *Freeman* exactly the law of the state. And the New York Court of Appeals has stated that the determination of the amount allowed as attorney's fees is a matter of discretion of the Surrogate's Courts, and held, in effect, that it is reviewable only under the same standard as that for a general verdict of a jury. The Service in this case does not purport to review the Surrogate's decree under that standard. Its inquiry is far broader.

The rule that the Surrogate's Court decision is reviewable only on the same criteria as reviewing the general verdict of a jury is not only the law of the State of New York; it is a sensible rule. The Service's position will not only require it to apply the nine factors listed by the Court of Appeals in the *Freeman* case[6] in an attempt to "second guess" the Surrogate, but if the estate disagrees the matter will then be submitted to a Federal District Court, the United States Claims Court or the United States Tax Court, presumably for another *de novo* determination. But the state court determination will still control the amount of the fee actually payable, even if the Federal Court arrives at a different amount.

The United States Court of Appeals for the Second Circuit below held that the Internal Revenue Service was not bound to follow the Surrogate's Court decision by

[6] These factors are: time and labor required; difficulty of the questions presented and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the benefit to the client from the service; community custom and practice regarding estate attorneys' fees; the contingency or certainty of compensation; the results obtained; the responsibility involved; and the amount involved. 34 N.Y.2d at 9.

reason of *Bosch*. However, the United States Court of Appeals for the Second Circuit has misconstrued and misapplied this Court's decision in *Bosch*.

The Supreme Court concluded in *Bosch* that "when the application of a federal statute [such as the Internal Revenue Code] is involved, the decision of a state trial court *as to an underlying issue of state law* . . . should not be controlling." [Emphasis added.] *Commissioner v. Estate of Bosch*, 387 U.S. at 465, *supra*.

This Court, however, made it clear that the Internal Revenue Service is bound by pronouncements as to state law made by the highest court of the state. There is no question but that the New York Court of Appeals (the State's highest court) has set forth the criteria under which attorneys' fees are to be determined. Although the United States Court of Appeals for the Second Circuit acknowledged that "the IRS is bound by the factors established by the New York Court of Appeals in [*In re Estate of*] *Freeman*, [34 N.Y.2d 1 (1974)]", it added that the Service "is not bound by the Surrogate's application of these factors."

It is submitted that the United States Court of Appeals is incorrect in that latter conclusion for two reasons. First, *as a matter of law*, the New York Court of Appeals has held that the initial determination of the amount of fees is to be made by the Surrogate's Court. The New York Court of Appeals will not review a Surrogate's exercise of discretion in making the determination of the fee, absent a showing of fraud, overreaching or some other reason to believe that the Surrogate did not properly pass upon the *Freeman* factors. *See also In re Estate of Aaron*, 30 N.Y.2d 718, 720 (1972). *Matter of Spatt*, 32 N.Y.2d 778 (1973). Indeed, *as a matter of state law*, the amount allowed as an attorney's fee by the Surrogate's Court is reviewable only under the same standard as that for a general verdict of a jury.

Some analogies should make the point more obvious. If the legislature had prescribed the allowance of an attorney's fee by statute (as a percentage of the estate, as is the case in some states[7]), the Internal Revenue Service would unquestionably be bound by the amount allowed as an attorney's fee under the statute.[8] As a practical matter, the result is the same in New York: as a matter of state law, the amount of attorney's fee, rather than determined pursuant to a mathematical formula, is fixed by the Surrogate's Court, and only by that Court. Alternatively, suppose the New York Court of Appeals had ruled that instead of having the fee fixed by the Surrogate, it would be fixed by a jury as a general jury verdict. This Court in no way indicated in *Bosch* that the Internal Revenue Service would not be bound by the general verdict of a jury. Presumably, the review by the Internal Revenue Service or Federal Courts would be made as though they were sitting as state courts of appeals and the review would be under the same criteria as made by the state appeal courts. *See Commissioner v. Estate of Bosch*, 387 U.S. at 463, *supra*; *cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The second reason why the Court of Appeals is wrong in its statement that under *Bosch* the IRS is not bound by the Surrogate's decision is that, as quoted above, *Bosch* applies only to matters of law (387 U.S. at 465); what is involved in this case is a determination of *fact*. And, just in the case of a general factual verdict of a jury, the Internal Revenue Service should respect a factual decision by a trial state court, when, as a matter of state law, review of that factual decision is on the same criteria as the general verdict of a jury.

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[7] *See, e.g.*, California Probate Code §910.

[8] Note that the I.R.S. accepted in this case the amount determined under SCPA §2307 as the proper amount allowable as the executor's commission—an amount determined simply by application of fixed percentages to the value of the estate.

D. Substantial Countervailing Policies Should Prevent Enforcement of the Summonses.

There are serious questions of "Federalism" raised by the decision of the Court of Appeals below. These are persuasively decided in the decision of the United States District Court below. *See United States v. White*, 650 F. Supp. at 909-911, *supra*.

There also are serious questions about the reasonable administration of the tax law. Indeed, even though the United States Court of Appeals for the Second Circuit directed enforcement of the IRS summonses, it stated, at the end of its decision, that "we . . . acknowledge that one may well wonder whether the IRS . . . is allocating wisely the time and effort of its limited staff . . . ." *United States v. White*, 853 F.2d at 117-118, *supra*.

Also, providing the Internal Revenue Service with uncontrolled access to an attorney's time records would be an unwarranted intrusion into the areas of attorney-client privilege and confidential communications between an attorney and client.

The attorney for the estate and the estate tax attorney from the Internal Revenue Service are adversaries. Permitting the Service to force the estate's attorney to disclose a broad range of information with respect to the representation of the estate grants the Service the proverbial "fishing license". It is inappropriate, in an adversarial context, to grant that license. Even if the exact nature of the matters the attorney has worked upon can be withheld from disclosure, the disclosure of the extent of time and attention paid by the attorney, even in broadly described areas, unfairly provides the Service with information it has no right to receive in an adversarial setting.

Moreover, the Bar Organizations are aware of circumstances where representatives of the Internal Revenue Service have threatened attorneys with the disallowance of all or a portion of the attorney's fees unless the attorney concedes, against the interests of the client, other substantive issues. As reprehensible as that action by the Service's representatives is, it places the attorney in a most awkward position in representing the client's best interests. It should not be encouraged.

Even in circumstances where the Service's representative does not overtly threaten to disallow the attorney's fee unless there is a concession on other issues, an implied threat of disallowance will subtly affect the negotiation of other estate tax issues and almost certainly permeate the entire audit.

Determination of the reasonableness of attorney's fees for services to decedent's estates should properly be left to the state court system, as Congress intended when it enacted I.R.C. §2053. It does not serve the public interest for the Federal court system to engage in duplicative litigation on such questions, causing further expense and delay in settling estates.

These issues of Federalism, proper allocation of government resources and intrusion into matters between attorneys and clients constitute "substantial countervailing policies" which bear on and should result in the non-enforcement of the IRS summonses. *See United States v. Euge*, 444 U.S. 707, 711 (1980).

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 2, 1988.

December 30, 1988

Respectfully submitted,

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APPENDIX

Internal Revenue Code
Sec. 2053. Expenses, Indebtedness, and Taxes.

(a) GENERAL RULE.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—,

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

Treasury Regulation
§20.2053-3 Deduction for expenses of administering estate—

(a) *In general.* The amounts deductible from a decedent's gross estate as "administration expenses" of the first category (see paragraphs (a) and (c) of §20.2053-1) are limited to such expenses as are actually and necessarily incurred in the administration of the decedent's estate; that is, in the collection of assets, payment of debts, and distribution of property to the persons entitled to it. The expenses contemplated in the law are such only as attend the settlement of an estate and the transfer of the property of the estate to individual beneficiaries or to a trustee, whether the trustee is the executor or some other person. Expenditures not essential to the proper settlement of

the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions. Administration expenses include (1) executor's commissions; (2) attorney's fees; and (3) miscellaneous expenses. Each of these classes is considered separately in paragraphs (b) through (d) of this section.

(c) *Attorney's fees.* (1) The executor or administrator, in filing the estate tax return, may deduct such an amount of attorney's fees as has actually been paid, or an amount which at the time of filing may reasonably be expected to be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will, nevertheless, be allowed, if the district director is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.

Treasury Regulation
§20.2053-1 Deductions for expenses, indebtedness, and taxes; in general

(b) *Provisions applicable to both categories*

(2) *Effect of court decree.* The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed. For example, if the question before the court is whether a claim should be allowed, the decree allowing it will ordinarily be accepted as establishing the validity and

amount of the claim. However, the decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may be rebutted by proof to the contrary. If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant. The decree will not be accepted if it is at variance with the law of the State; as, for example, an allowance made to an executor in excess of that prescribed by statute. On the other hand, a deduction for the amount of a bona fide indebtedness of the decedent, or of a reasonable expense of administration, will not be denied because no court decree has been entered if the amount would be allowable under local law.

Internal Revenue Code
Sec. 6110. Public Inspection of Written Determinations.

(j) SPECIAL PROVISIONS.—

(3) PRECEDENTIAL STATUS.—Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.

Internal Revenue Code
Sec. 7602. Examination of Books and Witnesses.

(a) AUTHORITY TO SUMMON, ETC.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

New York Constitution
Art. 6, §3. Jurisdiction of court of appeals

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

New York Surrogate's Court Procedure Act
§2110. Compensation of attorneys.

1. At any time during the administration of an estate and irrespective of the pendency of a particular proceeding, the court is authorized to fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or any person interested or of an attorney who has rendered legal services in connection with the performance of his duties as a fiduciary or in proceedings to compel the delivery of papers or funds in the hands of an attorney.

2. The proceeding shall be instituted by petition of a fiduciary of the estate or a person interested or an attorney who has rendered services. The court may direct payment therefor from the estate generally or from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested.

3. In any event that any such attorney has already received or been paid an amount in excess of the fair value of his services as thus determined the court is authorized to direct him to refund the excess.

New York Surrogate's Court Procedure Act
§2307. Commissions of fiduciaries other than trustees.

1. On the settlement of the account of any fiduciary other than a trustee the court must allow to him the reasonable and necessary expenses actually paid by him and if he be an attorney of this state and shall have rendered legal services in connection with his official duties, such compensation for his legal services as appear to the court to be just and reasonable and in addition thereto it must allow to the fiduciary for his services as fiduciary, and if there be more than one, apportion among them according to the services rendered by them respectively the following commissions:

(a) For receiving and paying out all sums of money not exceeding $100,000 at the rate of 5 per cent.

(b) For receiving and paying out any additional sums not exceeding $200,000 at the rate of 4 per cent.

(c) For receiving and paying out any additional sums not exceeding $700,000 at the rate of 3 per cent.

(d) For receiving and paying out any additional sums not exceeding $4,000,000 at the rate of 2-1/2 per cent.

(e) For receiving and paying out all sums above $5,000,000 at the rate of 2 per cent.

California Probate Code
§910. Ordinary proceedings; extraordinary services; compensation of paralegals

Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services.

Extraordinary services which the attorney may apply to the court for compensation include those services by any paralegal performing the extraordinary services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.

JOINT APPENDIX

(5)

No. 88-928

In The Supreme Court of the United States

OCTOBER TERM, 1988

JAMES M. WHITE, AS ATTORNEY FOR
AND AS THE EXECUTOR OF
THE ESTATE OF HELEN P. SMITH, DECEASED,
Petitioner,

vs.

UNITED STATES OF AMERICA AND
JAMES M. SERLING, ESTATE TAX
ATTORNEY, INTERNAL REVENUE SERVICE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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*Counsel of Record

PETITION FOR CERTIORARI FILED DECEMBER 2, 1988
CERTIORARI GRANTED FEBRUARY 27, 1989

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RELEVANT DOCKET ENTRIES

August 12, 1986	Petition to Enforce IRS Summons Filed
September 15, 1986	Response Filed
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October 16, 1986	Motion by Monroe County Bar Association to File Brief as Amicus Curiae Filed
October 30, 1986	Petitioner's Reply to Motion by Monroe County Bar Association Filed
November 3, 1986	Order Granting Motion by Monroe County Bar Association to File Amicus Curiae Brief Filed
November 10, 1986	Amicus Curiae Brief Filed by Monroe County Bar Association
November 14, 1986	Petitioner's Response to Monroe County Bar Association's Brief Filed
January 7, 1986	Decision and Order of Telesca, District Judge, Filed; Court Rules That Respondent Should Not Be Compelled to Obey IRS Summons and That Proceeding Should Be Dismissed Without Prejudice
January 8, 1987	Judgment on Decision Filed
March 4, 1987	Notice of Appeal Filed by Petitioner
March 13, 1987	Transcript of Proceedings Before District Judge Telesca on September 24, 1986 Filed

March 26, 1987	Original Documents, Docket Entries, and Clerk's Certificate Mailed to Clerk of United States Court of Appeals for Second Circuit
November 7, 1988	Certified Copy of Mandate of United States Court of Appeals for Second Circuit, With Opinion, Filed; Judgment of District Court Reversed and Matter Remanded For Further Proceedings
November 16, 1988	Order of District Judge Telesca Filed Granting Petition to Enforce IRS Summonses Issued on August 12, 1986; Respondent Ordered to Comply With Summonses No Later Than 60 Days From Date of Order
December 28, 1988	Motion Filed by Respondent To Extend Time To Comply with Order of November 16, 1988, so as to Afford Respondent Right to Exhaust All Appeals
January 5, 1989	Papers Opposing Stay Filed on Behalf of Petitioner
January 24, 1989	Decision and Order of District Judge Telesca Filed Denying Respondent's Motion for Stay
February 14, 1989	Original Mandate Sent To United States Court of Appeals for Second Circuit By Request

PETITION TO ENFORCE INTERNAL REVENUE SUMMONSES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and JAMES M. SERLING, Estate Tax Attorney, Internal Revenue Service,

Petitioners,

v.

JAMES M. WHITE, as attorney for and as the executor of the ESTATE OF HELEN P. SMITH, Deceased.

Respondent.

CIVIL ACTION NO.
[Filed: August 12, 1986]

The United States of America and James M. Serling, Estate Tax Attorney, Internal Revenue Service, by their attorney, Roger P. Williams, United States Attorney for the Western District of New York, show unto his court as follows:

1. This proceeding is brought pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C., Sections 7402(b) and 7604(a), to judicially enforce two Internal Revenue Service summonses.

2. The petitioner, James M. Serling, is an Estate Tax Attorney in the Examination Division of the Internal Revenue Service, employed in the Buffalo, New York, District of the Internal Revenue Service and is authorized to utilize Internal Revenue Service summonses issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C., Section 7602. Trea-

sury Regulations, Section 301.7602-1, 26 C.F.R. §301.7602-1; IRS Delegation Order No. 4 (as revised).

3. The respondent, James M. White, Esquire, may be found at 624 Executive Office Building, Rochester, New York, within the jurisdiction of this Court.

4. The petitioner, Estate Tax Attorney James M. Serling, is assigned to examine the federal estate tax liability of the Estate of Helen P. Smith; Helen P. Smith died November 10, 1982.

5. The purpose of the examination is to determine the correct estate tax liability of the Estate of Helen P. Smith, deceased.

6. The respondent, James M. White, performed services for the Estate of Helen P. Smith, deceased, as both attorney and executor. The Respondent, James M. White, is in possession of testimony, books, records, papers and other data relating to the Estate of Helen P. Smith, deceased, and thus to the tax liability under examination.

7. On May 1, 1985, petitioner, Estate Tax Attorney Serling, issued an Internal Revenue Service summons directing the respondent, James M. White, Esquire, as attorney for the Estate of Helen P. Smith, deceased, to appear before him on May 17, 1985, at 10:00 a.m., to testify and to produce books, records, documents and other data all as set forth in the attached summons and declaration, marked as Exhibits 1 and 3, respectively.

8. By letter dated May 3, 1985, respondent, James M. White, was advised that the appearance date of the summons was extended to June 10, 1985.

9. On February 3, 1986, petitioner, Estate Tax Attorney Serling, issued an Internal Revenue Service summons directing the respondent, James M. White, as Executor of the Estate of Helen P. Smith, deceased, to appear before him on March 4, 1986, at

9:30 a.m., to testify and to produce books, records, documents and other data all as set forth in the attached summons and declaration, marked as Exhibits 2 and 3, respectively.

10. The summonses were served on the respondent as indicated in the Certificates of Service on the reverse sides of Exhibits 1 and 2.

11. The respondent, James M. White, failed to appear in response to the summonses, failed to give testimony, or to produce the summoned data for examination. These failures continue to the date of the filing of this petition.

12. The testimony and the other data sought by the summonses are not already in the possession of the Internal Revenue Service.

13. The testimony and the other data demanded by the summonses are necessary for the determination of the correct federal estate tax liability of the Estate of Helen P. Smith, deceased, as is evident by the attached declaration of the petitioner, Estate Tax Attorney Serling, incorporated in this petition by reference.

14. The testimony and other data demanded by the summonses relate to the liability under examination, and might shed light on the correctness of the federal tax liability of the Estate of Helen P. Smith, deceased.

15. All procedures required by the Internal Revenue Code of 1954, as amended, were followed with respect to these summonses.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondent, James M. White, to show cause, if any he may have, why he

should not comply with and obey the summonses served upon him and each and every requirement thereof.

2. That this Court enter an order directing the respondent, James M. White, to obey the summonses served upon him, and each and every requirement thereof, and ordering his attendance and testimony and the production of books, records, documents and other data as required by the terms of the summonses before Estate Tax Attorney Serling, or any other authorized officer or employee of the Internal Revenue Service, at such time and place as may hereinafter be fixed by Estate Tax Attorney Serling, or any other authorized officer or employee of the Internal Revenue Service, or by this court.

3. That the United States recover its costs in maintaining this action.

4. That the court render such other and further relief as is just and proper.

ROGER P. WILLIAMS
United States Attorney

By: ______________________

Assistant United States Attorney
[Signature]
DEBORAH S. MELAND
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 55
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202/FTS) 725-6549

[Department of the Treasury]
[Internal Revenue Service letterhead]
SUMMONS
[Government Exhibit 1]

In the Matter of Estate of Helen P. Smith
Internal Revenue District of Buffalo. Periods Date of Death: November 10, 1982
The Commissioner of Internal Revenue
To James M. White, Executor and Attorney
At 624 Executive Office Building, Rochester, New York 14614

You are hereby summoned and required to appear before: James M. Serling, Attorney (Estate Tax), an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the Internal Revenue Laws concerning the period identified above for the periods shown.

Any and all records and documents relating to the administration of the Estate of Helen P. Smith including but not limited to the correspondence file of the executor and attorney, administrative records, records of purchase, sale and distribution of securities of the decedent, bank statements, checking records, any pleadings, stock brokerage statements, legal documents prepared in connection with the taxpayer, assignment or payments to the heirs and beneficiaries of the estate, any diary or other records maintained showing the attorney's and/or executor's activities, telephone calls, conferences or court appearances and documents prepared for all the state and federal tax returns filed for the estate.

Business address and telephone number of Internal Revenue Service officer named above: Internal Revenue Service, 100 State Street, Room 122, Rochester, New York 14614 (263-3170)
Place and time for appearance: at 100 State Street, Room 122, Rochester, New York 14614 on the 17th day of May, 1985 at 10:00 o'clock A.M. issued under authority of the Internal Revenue Code this 10th day of June, 1985

[James M. Serling signature]	Attorney (Estate Tax)
Signature of Issuing Officer	Title

[Department of the Treasury]
[Internal Revenue Service letterhead]
SUMMONS
[COPY]
[Government Exhibit 2]

In the Matter of Estate of Helen P. Smith
Internal Revenue District of Buffalo. Periods Date of Death: November 10, 1982
The Commissioner of Internal Revenue
To James M. White, Executor
At 624 Executive Office Building, Rochester, New York 14614

You are hereby summoned and required to appear before: James M. Serling, Attorney (Estate Tax), an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the Internal Revenue Laws concerning the period identified above for the periods shown.

Any and all records and documents relating to the performance of the duties of executor of the Estate of Helen P. Smith, including, but not limited to, the collection and conservation of the decedent's assets, payment of all debts, estate and all income taxes, arrangement and payment of funeral and administration expenses, correspondence file of the executor, administrative records, records of purchase, sale and distribution of securities of the decedent, bank statements, checking records, stock brokerage statements, assignment or payments to the heirs and beneficiaries of the estate, diary or other records maintained showing executor's activities, telephone calls, conferences, all statements and schedules of accounts, court appearances, all documents

prepared for all state and federal tax returns filed for the estate and all records rendered to the estate pertaining to all legal services performed by James M. White, Attorney for the estate.

Business address and telephone number of Internal Revenue Service officer named above: Internal Revenue Service, 100 State Street, Room 122, Rochester, New York 14614 (263-3170)
Place and time for appearance: at 100 State Street, Room 122, Rochester, New York 14614 on the 4th day of March, 1986 at 9:30 o'clock A.M. issued under authority of the Internal Revenue Code this 3rd day of February, 1986

[James M. Serling signature]	Attorney (Estate Tax)
Signature of Issuing Officer	Title

[Government Exhibit 2]

DECLARATION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
and JAMES M. SERLING, Estate
Tax Attorney,
Petitioners,
v. CIVIL ACTION NO.
JAMES M. WHITE, as attorney for
and as the executor of the ESTATE
OF HELEN P. SMITH, Deceased.
Respondent.

James M. Serling, pursuant to the provisions of Title 28 U.S.C., Section 1746 certifies that:

1. I am a duly commissioned estate tax attorney employed in the Examination Division in the Buffalo Office of the District Director of the Internal Revenue Service, with a post of duty at Rochester, New York.

2. In my capacity as estate tax attorney, I am conducting an examination to determine the correct estate tax liability of the Estate of Helen P. Smith, deceased.

3. I am authorized to utilize Internal Revenue Service summonses issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C., Section 7602 and Treasury Regulations, Section 301.7602-1; IRS Delegation Order No. 4 (revised).

4. During the course of my examination, I learned that James M. White performed services for the Estate of Helen P. Smith, deceased, as both attorney and executor and is in possession of books, records, or other data, and testimony relating to the Estate's correct tax liability.

5. Pursuant to my examination and in accordance with Section 7602 of the Internal Revenue Code of 1954, on May 1, 1985, I issued an Internal Revenue Service summons to James M. White, as attorney for the Estate of Helen P. Smith, deceased; a photocopy of this summons is attached to the petition as Exhibit 1.

6. By letter dated May 3, 1985, James M. White, was advised that the appearance date of the summons was extended to June 10, 1985.

7. The summoned person, James M. White, as attorney of the Estate of Helen P. Smith, deceased, failed to appear in response to the summons, to give testimony, or to produce the summoned data for examination as required by the summons; this failure continues to the date of this declaration.

8. Pursuant to my examination and in accordance with Section 7602 of the Internal Revenue Code of 1954, on February 3, 1986, I issued an Internal Revenue Service summons to James M. White, as executor of the Estate of Helen P. Smith, deceased; a photocopy of this summons is attached to the petition as Exhibit 2.

9. The summoned person, James M. White, as executor of the Estate of Helen P. Smith, deceased, requested an extension of time to appear; an extension was granted to March 13, 1986.

10. On March 13, 1986, a representative of James M. White appeared before me and requested information relative to the

issues involved in the summons. On March 20, 1986, Mr. White's representative informed me that Mr. White would not appear in response to the summons, give testimony, or produce the summoned data for examination as required by the summons; this failure continues to the date of this declaration.

11. Service of the summonses was made and notice of the summonses was given as required by law, as is evidenced by the completed Certificates of Service and Notice on Exhibits 1 and 2, pages two.

12. All procedures required by the Internal Revenue Code of 1984, as amended, were followed with respect to these summonses.

13. The testimony and the books, records, papers, and other data demanded by the summonses issued to and served upon James M. White are not already in the possession of the Internal Revenue Service.

14. The testimony and the books, records, papers, and other data demanded by the summonses issued to and served upon James M. White are necessary for the correct determination of the federal estate tax liability of the Estate of Helen P. Smith, deceased.

I certify under penalty of perjury that the foregoing is true and correct.

Executed at Rochester, New York, this 2nd day of June, 1986.

[Signature]
JAMES M. SERLING
Estate Tax Attorney
Examination Division
Internal Revenue Service
Rochester, New York

RESPONSE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and JAMES M. SERLING, Estate Tax Attorney, Internal Revenue Service, Petitioners,	MISC. CIVIL ACTION NO. 86-140T [Filed: September 15, 1986]
v.	
JAMES M. WHITE, as attorney for and as the executor of the ESTATE OF HELEN P. SMITH, Deceased. Respondent.	

JAMES M. WHITE, for himself and as Executor of the Estate of Helen P. Smith, deceased, show unto this court as follows:

1. ADMITS those allegations contained in the Petition by paragraphs designated 3, 4, 5, 6, 7, 8, 9, and 10.

2. DENIES sufficient knowledge and information so as to form a belief as to those allegations contained in paragraphs 1 and 15.

3. DENIES sufficient knowledge and information so as to form a belief as to those allegations contained in paragraph 2 of the Petition, except he admits James M. Serling is an estate tax attorney employed in the Buffalo, New York, District of the Internal Revenue Service.

4. DENIES those allegations contained in the Petition by paragraphs designated 11, 12, 13, and 14.

5. DENIES each and every allegation in the Petition which is not specifically admitted, denied or controverted.

6. ADMITS those allegations made by the Declaration of James M. Serling (Government Exhibit 3, attached to Petition) by paragraphs designated in said Declaration as 1, 2, 3, 4, 5, 6, 8, 9, and 11.

7. DENIES sufficient knowledge and information so as to form a belief as to the allegations contained in said Declaration by paragraph designated 12.

8. DENIES sufficient knowledge and information so as to form a belief as to paragraph designated 10 in said Declaration, except that the Respondent had earlier responded by letter dated January 3rd, 1986 which was in response to a similar request by Mr. Serling by letter dated December 16th, 1985. In addition Respondent personally responded via telephone to Mr. Serling who was well aware of all facts and circumstances pertaining to Respondent's position in this matter.

9. DENIES each and every allegation contained in Mr. Serling's Declaration by paragraphs designated 7, 13, and 14.

10. DENIES each and every allegation of Mr. Serling's Declaration not specifically admitted, denied or controverted.

AS AND FOR HIS FIRST AFFIRMATIVE DEFENSE,

11. Respondents readmits and realleges all of the allegations contained in paragraphs designated 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 above.

12. The essence of this particular motion is contained in paragraph designated 11 of the Petition, wherein it is alleged that I failed to appear in response to the summonses, failed to give testi-

mony, or to produce the summoned data for examination. In addition, it is quoted "These failures continue to the date of filing of this Petition."

13. On July 17th, 1984, the Surrogate of Monroe County signed a Judicial Decree pursuant to an Accounting submitted to that court which among other things awarded the respondent certain executor's commissions and legal fees. The legal fees amounted to Sixteen Thousand Eight Hundred Dollars ($16,800.00).

14. Pursuant to that Decree, the Petitioner, as Executor, distributed the balance of the funds due the nine residual beneficiaries of the estate. In addition, he paid himself both the commissions and the legal fees awarded by the Surrogate.

15. On or about August 7th, 1984, the respondent received a telephone communication and a request from the Petitioner, James Serling, for a conference. On or about the same date, Petitioner Serling and James White spent in excess of two hours in conference reviewing the 706 Form. Mr. Serling at that time had the original 706 which was amended by the respondent at a later date. At the time of the August 7th conference, Petitioner Serling expressed surprise that a Judicial Decree had been signed by the Monroe County Surrogate.

16. Since August 7th, 1984, to date, Petitioner Serling, and Respondent have been in an extensive period of conferences, correspondence, positioning and researching the respective positions pertaining to the matter at hand.

17. Upon information and belief, Petitioner Serling requested time to review the Surrogate's Court records to assure himself of the proof of the facts as alleged by the Respondent.

18. At some subsequent date, Petitioner Serling informed me he had reviewed the file and Surrogate's Court records and assured himself of the validity of the Decree of Judicial Settlement.

19. The issue then boiled down to the question of whether or not the Internal Revenue Service had a right to review and go beyond a Judicial Decree as a matter of law. In order to substantiate his position, Petitioner Serling forwarded a letter dated January 29th, 1985, to the Respondent. (See Exhibit B-Schedule 1)

20. In that letter, Petitioner Serling requested a response by February 22nd, 1985.

21. On or about February 14th, 1985, the Respondent informed Petitioner Serling he was on trial, would be unable to respond by February 22nd, 1985, and requested an extension until the end of February. (See Exhibit A)

22. In an attempt to fully substantiate the Surrogate's award, the Respondent contacted the Monroe County Surrogate who awarded the fees, the Hon. Arnold F. Ciaccio, and requested a letter from him substantiating the attorneys fees allowed in the amount of $16,800.00.

23. On or about February 25th, 1985, the Surrogate responded by letter addressed to me indicating he had re-reviewed the file and would have in fact awarded me an additional $700.00 had Respondent made application for that amount. He further indicated he was well aware of the *Matter of Freeman* and the *Matter of Potts*, which are the hallmark New York State cases regarding decedent's estate attorneys fees. He further indicated he was well aware of the fact I was the Executor and a commission was awarded and indicated the same in his correspondence. (See enclosure to Exhibit B, Schedule 2)

24. In response to Petitioner Serling's letter of January 29th, 1985, Respondent forwarded him a letter dated February 27th, 1985, explaining his position, commenting on certain aspects of Mr. Serling's January 29th, 1985 correspondence and enclosing a copy of Judge Ciaccio's February 25th, 1985, letter. (See Exhibit B, Schedule 2)

25. On or about May 1st, 1985, Petitioner Serling contacted the Respondent by telephone and informed him he had a Summons to issue directing the Respondent to supply certain information requested as the attorney for the estate and to appear before him on May 17th, 1985. Subsequent thereto Respondent was notified that the date of appearance was extended to June 10th, 1985.

26. During this period of time, Respondent and Petitioner Serling had one or two telephone conferences wherein Respondent indicated his position was well known to the Petitioner but he would outline it in letter form, which in sum or substance would be a reaffirmation of his position and the basis for it.

27. On or about June 5th, 1985; Respondent prepared a letter directed to Petitioner Serling which expressed as thoroughly as possible Respondent's position, the law involved, and the reasonableness of his request in refusing to adhere to the unreasonableness of the summons in this case. (See Exhibit B, Schedule 1, Exhibit B, Schedule 2 with enclosure) Respondents Exhibit B was hand delivered to Petitioner Serling on or about June 10th, 1985, at his office with a full understanding between Petitioner Serling and himself that the file would not be produced as requested because of the immateriality and irrelevancy of the demand.

28. On or about December 16th, 1985, Respondent received an additional letter from Petitioner Serling, dated December 16th, 1985, requesting in affidavit form a detailed account of

what duties were performed in Respondent's capacity as Executor.

29. Response was requested to be received no later than December 31st, 1985. (See Exhibit C)

30. It is Respondent's recollection, Petitioner Serling and he had a conversation regarding the attempt to backdoor the event as to the attorneys fees by requesting the executor information.

31. Although Respondent did not respond by December 31st, 1985, he did respond by letter dated January 3rd, 1986, as to what he did to earn the commissions as Executor. (See Exhibit D)

32. The amount of the Executor's commission was statutory, never in question, and in fact was allowed except to the extent that the Surrogate had awarded commissions on income, which is, by law, not allowable as an estate deduction. The amount of the Executor's commissions claimed by the Respondent in the Amended 706 form, were slightly reduced and accepted by the Respondent as a legitimate reduction to the deduction claimed on the said return.

33. On or about February 3rd, 1986, Petitioner Serling again telecommunicated to the Respondent he had a Summons directing the Respondent as Executor of the Estate to produce the same documents requested in his capacity as Attorney. Petitioner Serling and the Respondent mutually agreed on a time for Petitioner Serling to personally serve him. At the time of the service, Petitioner Serling and the Respondent again extensively discussed the positions of the service versus the Respondent.

34. At this time, the Respondent was most fully aware that the revenue service wanted this to be a case of first impression, for lack of a better term, and was insistent on pursuing it to the full

extent of its capacity. In sum or substance, Petitioner Serling concurred in this thinking.

35. In order to better evaluate the situation, Respondent appeared by representative on March 13th, 1986, who requested information relative to the issues involved in the Summons.

36. Respondent's representative reported to him and furnished him with certain documents that had, upon information and belief, been given to him by petitioner Serling. They were to wit:

A. A copy of the Court of Appeals case IN THE MATTER OF ACCOUNTING OF LINCOLN ROCHESTER TRUST COMPANY, AS EXECUTOR OF JULIUS FREEMAN, DECEASED, RESPONDENT, JAMES A. FREEMAN, APPELLANT, argued January 10th, 1974, Decided March 27th, 1974, Reported in 34 New York Reports, 2nd at page 1.

B. A copy of the case of THE ESTATE OF JOSE F. GIL, DECEASED, SAMUEL KAPLAN, AS ADMINISTRATOR OF THE ESTATE OF JOSE F. GIL, DECEASED, RESPONDENT: EMILA P. GIL, APPELLANT, 67 A.D. 2d 779 (3rd Dept.)

C. A copy of various documents regarding attorneys compensation pursuant to SCPA, Section 2110. A copy of the case IN THE MATTER OF THE ESTATE OF THE ESTATE OF LOUISE A. SCHAICH, DECEASED, PATRICK BEARY, APPELLANT: MARGARET VERBEL, ETAL, RESPONDENTS, 55 AD 2nd, 914.

D. Internal Revenue Service Memorandum from Attorney Douglas A. Kenwell, dated November 12th, 1985, to Estate Tax Attorneys. Internal Revenue Service Memorandum dated October 7th, 1985, from the Assistant Commissioner (Examination).

E. A copy of Internal Service Memorandum dated June 17th, 1985, to Estate Tax Attorneys from Douglas A. Kenwell, Subject: Erie County Surrogate's Practice on fees with attached newspaper article from the Buffalo News upon information dated Friday, June 14th, 1985.

F. A letter dated September 7th, 1982, from the Hon. Frederic T. Henry, Jr., Surrogate Judge, Ontario County, regarding Estate fee guidelines.

G. A copy of a letter dated January 17th, 1983, by the Hon. Henry J. Scudder, Surrogate, regarding suggested attorney fee guidelines for estates.

H. Internal Revenue Service Memorandum dated August 26th, 1985, to Estate Tax Attorneys. Subject: Attorneys Fees — Allegheny County; with attached letter dated July 25th, 1985, by the Hon. Wayne A. Feeman, Jr. and Hon. Peter R. Sprague.

I. Internal Revenue Service Memorandum dated January 13th, 1986, to Estate Tax Attorneys from Douglas A. Kenwell; Subject: Attorneys fees — Yates County Surrogate's Court with attached letter dated January 7th, 1986, from the Hon. Frederick D. Dugan.

J. Internal Revenue Service Memorandum dated August 21st, 1985, to Douglas A. Kenwell from one Donald E. Sanford, Jr. Subject: "Local Practice". Reference Attorneys fees in Genesee County Surrogate's Court.

37. Copies of the above documents (Paragraph 36, A-J) were delivered to Respondent by his representative for review and comment. Respondent's thoughts on all of the above did nothing but fortify and substantiate the fact the Internal Revenue Service looks towards local Surrogate Courts to establish the reasonableness of fees in each individual county. As a point of interest, no

notices or memorandums, newspaper clippings or letters were given the Respondent from the Surrogate's Court or pertaining to the Surrogate's Court of Monroe County, the court in question.

38. The attempt at comparing the practice of law in Monroe County in contrast to that in Yates, Genesee, etc. and even Erie County, can only be best judged by Surrogates in that community.

39. The serious allegation made on page 3 of the Petition that the Respondent failed to appear in response to the Summonses, failed to give testimony, or to produce the sum and data for examination, is not at all factual. In response to the Summons as attorney, Respondent timely appeared and delivered a letter to Petitioner Serling with full understanding by Petitioner Serling as to the Respondent's position and the reasons therefor. The testimony of this Petitioner was contained in his letter dated June 5th, 1985, which was hand delivered to Petitioner Serling.

40. The Summons regarding the Executor's commission was an attempt by the Service, as stated above, to solidify their position regarding the attorneys fees.

41. The Respondent did not ignore the Summons regarding his records as the Executor, but retained a bonafide representative to appear in his stead. This procedure is an authorized one, duly acknowledged by the Internal Revenue Service, of responding to their requests and/or summons.

42. Petitioner Serling not only discussed the matter with the representative but furnished him with the above referred to documents in paragraph numbered 36.

43. The Respondent has had numerous discussions and conferences with Petitioner Serling regarding the above matter

which disclosed to Respondent the high priority of the issue at hand, estate attorney fees as seen by the Revenue Service and its intended blind pursuit for reasons known only to themselves.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, RESPONDENT ALLEGES AS FOLLOWS:

44. Realleges, reaffirms and restates all those allegations contained in paragraphs designated 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 43 above.

45. Paragraph 13th of the Petition states the information sought is necessary for the determination of the correct Federal Estate Tax liability of Mrs. Smith's estate.

46. Petitioner Serling admitted the validity of the Judicial Decree signed by the Hon. Arnold F. Ciaccio on July 17th, 1984.

47. Petitioner Serling also never disputed the fact that the fee was paid by the Respondent as Executor to himself as Attorney. In reviewing the Surrogate's Court Procedure, Petitioner Serling had an opportunity to review all documentation filed in Surrogate's Court. Those court documents contained all information pertaining to the probate of the Will, the Accounting, the Decree of Judicial Settlement, the New York State Tax information, the number of distributees and legatees, their places of residence, and the amount of the estate, which as is stated in *Freeman*, is a substantial fact in computing fees.

48. Consequently, it is incorrect for the Revenue Service to state that the information in Respondent's personal file is necessary for the determination of the correct Federal Estate Tax Liability of the Estate of Helen P. Smith, deceased.

49. Consequently, the allegations contained in paragraph designated 12th of the Petition is incorrect to the degree that the

Department is aware and reviewed all public documents pertaining to this case. These documents may not be in their possession, but are available and were reviewed by Petitioners.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, RESPONDENT ALLEGES AS FOLLOWS:

50. Realleges, reaffirms and restates all those allegations contained in paragraphs designated 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, and 49 above.

51. The proceeding at hand is moot.

52. On or about July 7th, 1986, Respondent received a letter dated July 7th, 1986, from Petitioner Serling which enclosed his proposed work paper adjustments regarding the estate tax in question. Said letter indicated that in due time Respondent would receive from Buffalo a statutory notice of deficiency. (See Exhibit E with attachments)

53. On or about July 17th, 1986, Respondent received a Internal Revenue form. Letter 902(DO) (Rev. 8-84), commonly known as a ninety-day letter. (See Exhibit F)

54. Said ninety-day letter indicated there was a deficiency in the amount of $5,754.19.

55. Said ninety-day letter also had attached to it Internal Revenue Form 5564 known as an Irrevocable Waiver with certain information attached thereto.

56. Said ninety-day letter also had attached to it a copy of Form 3614-A which indicated there would be an increase to the taxable estate of $1506.41 from Schedule B, Stocks and Bonds. This amount was for interest includable on certain bonds and not

reported on the Amended 706. This amount is not in the dispute by the Respondent and the tax thereon was fully paid with all past due interest.

57. In addition, Form 3614-A indicated there would be an increase to the taxable estate from Schedule J, Administrative Expenses, in the amount of $17,176.00 which primarily consisted of a complete disallowance of the attorneys fees in the amount of $16,530.00, the amount claimed on the Amended Return. The balance was for a reduction in the Executor's Commission which is not contested and the tax due was paid with all past due interest.

58. The ninety-day letter informed Respondent he had ninety days from the mailing date of the letter (July 16th, 1986) in which to file a Petition with the United States Tax Court. In addition it contained information there was a simplified procedure provided by the Tax Court for small tax cases which are less than $10,000.00. This applies to the estate in question since the deficiency amounted to $5,754.19.

59. In addition, Revenue Form 5564 informed Respondent he had a right to pay the tax, file a Notice of Claim (Revenue Form 843) and to apply to the U.S. District Court for a refund of any contested amount, if said action is commenced within two years from the paying of the tax.

60. Subsequent to the receipt of that letter, and before the proceeding at hand was commenced, Respondent had contacted Petitioner Serling and informed him he was going to pay the tax. He requested Mr. Serling to obtain the amount of interest that would be due as of a selected date, which was August 22nd, 1986.

61. On the same date, Petitioner Serling telephoned the Respondent and informed him that the interest to August 22nd,

1986, was $2,265.74, making a total payment obligation allegedly due the government of $8,019.93.

62. On August 21st, 1986, the Petitioner forwarded a check made payable to the Internal Revenue Service to the Buffalo office in an envelope provided by the Service among its other enclosures with the ninety-day letter.

63. Both Respondent and Petitioner have rights. The Petitioners exercised their rights by disallowing the entire legal fee, although they had full documented knowledge that legal work had been done for the estate.

64. As a result of their decision to disallow the claimed deduction for legal fees, they duly notified the Respondent with the ninety-day letter.

65. As a result of said letter, the Respondent had rights, and alternatives as set out in the Services own ninety day letter; one of which was to pay the alleged tax due or sue for a refund in this very court. This Respondent elected to do.

66. By Petitioners' decision to disallow the entire fee and Respondent's decision to pay the tax with appropriate interest, the matter at hand is moot. Respondent has filed his Notice of Claim (IRS Form 843) and the Service now has six months in which to re-evaluate its decision, reaffirm it, modify it or reverse itself. In the event it does not do within six months from the date of the Notice (To wit: February 22nd, 1987) the Respondent has his statutory rights to petition for a refund. This he intends to do.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE AND, FIRST COUNTER-CLAIM, RESPONDENT ALLEGES AS FOLLOWS:

67. Realleges, reaffirms and restates all those allegations contained in paragraphs designated 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13,

14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 47, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 above.

68. There is no question the Revenue Service is intent and intense on pursuing the matter at hand for reasons known only to them.

69. The Revenue Service is given great powers, both statutorily and by the Commissioners rulings. Just as all tax payers are subject to such laws and rules and regulations, so is the Service itself.

70. Respondent believes in the responsibleness and reasonableness of his position. The Petitioners, primarily the Revenue Service, is fully aware of the responsibileness of the Respondent's position. Never-the-less, with all of the correspondence and miscellaneous communications had between Petitioner Serling and the Respondent, the Petitioners' Affidavit erroneously, if not falsely, indicates, if not does state, that Respondent failed to appear and failed to give testimony on the ultimate return dates of the Summonses. Respondent did appear and did give written testimony on both occasions. These facts are not in dispute between Respondent and Petitioner Serling.

71. The Service decided to assess a deficiency. It had a right to do so. The Service had a right to petition for contempt. It decided to do so. But it cannot pursue a multiplicity of actions in a matter such as this. Their decision to levy an assessment gave Respondent certain rights and alternatives one of which rightly and justly pursued.

72. As a consequence of his pursuit and decision to pay the tax, the Revenue Service was precluded from issuing a contempt Petition.

73. The issuance of this Contempt Petition subsequent to the deficiency assessment, coupled with the facts of misrepresentation in the Petition, indicates the unreasonableness of the Services' pursuit to obtain powers not granted it by Congress or its own Rulings or Regulations.

74. Respondent informed Petitioner Serling many times during this entire scenario that the Revenue Service was harrassing him.

75. The Service's decision to file a Contempt Petition after the deficiency assessment can be nothing more but an acknowledged harrassment since the Service had before it all necessary information, communications and positioning by the Respondent in his attempt to comply with the reasonable aspects of the Summonses issued by the Service.

76. Respondent, not only requests Petitioners be denied their motion that the government recover its costs in maintaining this action, but Respondent requests that pursuant to Section 2412(b) of the Judicial Code, the government be ruled to have acted in bad faith, has harrassed Respondent to where he is entitled to legal fees and the costs of defending this motion.

WHEREFORE, Respondent respectfully prays:

1. That this court deny all of requests in Petitioners' Petition; and

2. Grant Respondent such costs, attorneys fees and other expenses as are allowable pursuant to law; and

3. That the court render such other and further relief as is just and proper.

Dated: September 15, 1986

[Signature]

JAMES M. WHITE, RESPONDENT
Office and Post Office Address
624 Executive Office Building
P.O. Box 14298
Rochester, New York 14614
Telephone: (716) 454-2060

TO: ROGER P. WILLIAMS, ESQ.
UNITED STATES ATTORNEY
By: Jonathan W. Feldman
Ass't. United States Attorney

Deborah S. Meland
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 55
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202/FTS) 725-6549

[Exhibit A]

February 14, 1985

Internal Revenue Service
100 State Street
Rochester, New York 14614

ATTENTION: James M. Serling, Esq., Estate Tax Division

Re: Estate of Helen P. Smith, Your File No. E:E:1210:JMS

Dear Jim:

I am in receipt of your letter dated January 29, 1985, and intend to respond to it.

You requested a response by February 22, 1985. I am presently on trial and will be unable to properly respond by that time.

Therefore, I would appreciate it if you would grant me an extension until the end of the month.

Awaiting your response, I remain,

Very truly yours,

James M. White

JMW/kh

[Exhibit B]

June 5, 1985

Internal Revenue Service
Department of the Treasury
100 State Street
Rochester, New York 14614

ATTENTION: James M. Serling, Esq. (Estate Tax)

Re: Estate of Helen Parker Smith, Your Ref. No. E:E:1210:JMS

Dear Mr. Serling:

This letter is in response to the Summons served upon me as Executor and attorney for the above-referred to estate, requesting I permit your office to examine the books, papers, records, etc. referred to in said Summons.

As you are well aware, this matter has been discussed, researched and negotiated for many, many months. The heart of it centers on the attorney's fees taken as a deduction on Form 706. I am unaware of the Commissioner raising any other issue regarding this return. I do realize there may be some minor adjustments for stock valuations, etc. If such is the case, then the file is available for that purpose.

Since the only substantive issue is the attorney's fee and the reasonableness thereof, I am of the opinion, based upon a review of the law and Section 7602 itself, that the facts, circumstances and background of this case are such that the authorization to examine does not exist since it is not relevant or material for the purpose of ascertaining the correctness of the return. [See Section 7602 (1)]

The facts are unequivocal that as Executor, I obtained a Judicial Decree from the Monroe County Surrogate's Court. Pursuant to that Decree, the attorney's fees allowed by the Surrogate were $16,800.00. The amount deducted on Form 706 was $16,530.00. Consequently, if anything, the estate would be entitled to an additional deduction of $270.00, which said additional deduction has not being claimed nor is it being requested at this time.

More recently, you and I have exchanged correspondence by your letter to me dated January 29, 1985 and my response thereto dated February 27, 1985. Copies of both of these are enclosed as Schedules 1 and 2, respectively.

Attached to Schedule 2 is a letter from the Honorable Arnold F. Ciaccio, Surrogate for the County of Monroe, setting forth his Court's knowledge, awareness and procedures in awarding reasonable fees. Even without Judge Ciaccio's letter, I believe I have cited more than sufficient legal precedents, both statutory, administrative and judicial, indicating Congress' intention to have administrative expenses determined locally.

Obviously, in Monroe County, the Surrogate is the local official who determines the reasonableness of legal fees and expenses. He handles these on a daily, weekly, monthly and annual basis and is in the best position to determine such issues.

In pursuing the reasonableness of this fee, your office is in the process of attempting to value an expense which has already been determined by the Court of competent jurisdiction.

The matter can only be material and relevant if your office claims to be the exclusive agency to determine the reasonableness of expenses as opposed to the local Surrogate's Court, a position I find contrary to law. The argument, therefore, may be more broad-based than the applicability of the deduction regarding

this estate. The conflict could be between the Commissioner and the Surrogate's Court, but it is not between this Executor and the Commissioner.

In preparing, proceeding with, and obtaining the Judicial Decree, and my subsequent review thereof, I find nothing in the Federal statutes, Commissioner's rulings and regulations, or case Decisions, which would indicate the Monroe County Surrogate, absent fraud, is not the material and relevant body to set fees. Once set, to allow your office to subsequently rule on the same matter would permit the Commissioner to open or second guess every pertinent State Court Order or Decree. Such a procedure would untowardly upset the intent of Congress and the balance between the State and Federal Governments.

Since fraud has not been alleged as stated above, I must again conclude that any examination you conduct of the records requested, is not relevant or material to the inquiry you are making.

Consequently, I respectfully decline to permit you to examine that portion of the file which may have a bearing upon the fees as set by the Surrogate of Monroe County. The file will be made available for any reasonable examination in the event there are other adjustments or matters for discussion besides the attorney's fees.

Respectfully yours,

James M. White

JMW/kh
Enclosures

[SCHEDULE 1]
[Internal Revenue Service letterhead]

Date: January 29, 1985
In reply refer to E:E:1210:JMS

James M. White, Esq.
624 Executive Office Building
Rochester, New York 14614

Re: Estate of Helen P. Smith

Dear Mr. White:

On July 23, 1984, an appointment letter was mailed to you as executor and attorney for the above named estate. The letter requested examination of pertinent records and documents, including justification of the legal fees claimed. Time records were asked to be examined and if not available, then a furnished list of all legal work performed, time expended for each service and hourly rate. The requested legal fee information was based on the reasonableness of the legal fee claimed as an estate tax deduction on the estate tax return. On said issue, various enclosures were sent with the appointment letter and *Matter of Freeman*, 34 NY2d 1 was cited.

At the audit, the legal fee was discussed. It was at this time that I was presented a Decree of Judicial Settlement for the estate wherein the Surrogate Court Judge Ordered, Adjudged and Decreed that $16,800.00 be paid for legal services rendered. You are of the opinion that the Court Decree has determined the reasonable legal fee issue. I informed you that said Decree did not preclude the necessity of the information asked for in the appointment letter. You are also of the opinion that the issue of reasonableness is not pertinent since the fee has already been paid. I disagree with you. Under I.R.C. Reg. 20.2053-1(b)(2):

The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. — The decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the claim. In the case of *Estate of Smith v. Commissioner*, 510 F.2d. 479, 482-483 (2d Cir. 1975), cert. denied, 423 U.S. 827 (1975) the Second Circuit, after quoting Treas. Reg. Section 20.2053-1(b)(2), held in effect that questions of both the characterization and the reasonableness of an administration expense under I.R.C. Section 2053 (a)(2) are questions of state and federal law, with federal law establishing the outside limits of allowable deductions.

As I have previously explained to you, there is no uniform rules which can be followed in the determination of the reasonableness of attorney's fees in estate tax cases. Each case must be determined upon its own facts and circumstances taking into consideration the following factors:

1. Amount involved
2. Time and effort of attorney
3. Seriousness of problems
4. Results obtained
5. Experience and ability of attorney
6. Length of administration

Based on all of the above, I again ask that you submit in affidavit form a detailed list of all services performed, time expended one each item and your hourly rate. If you do not wish to comply with this request then I renew my request to go through all of your administrative files so I can make a determination based on the criteria listed above. I also enclose for your information Treasury Department Circular No. 230 (Revised 6-79) Regulations Gov-

erning the Practice of Attorneys, et al — before the Internal Revenue Service, Section 10.20(a).

Please respond to the above request by February 22, 1985.

Very truly yours,
[Signature]
James M. Serling
Attorney (Estate Tax)

Encl.

[SCHEDULE 2]
[James M. White letterhead]

February 27, 1985

Internal Revenue Service
Department of the Treasury
100 State Street
Rochester, New York 14614

ATTENTION: Mr. James M. Serling, Esq. (Estate Tax)

Re: Estate of Helen P. Smith, Your Ref. No. E:E:1210:JMS

Dear Mr. Serling:

This letter is in response to yours dated January 29, 1985 regarding the legal fees claimed as a deduction from the estate tax of the above-named decedent.

I have taken the liberty of discussing this matter with Judge Ciaccio and requested a letter from him since, in my opinion, the legality of the situation rests upon his Decree.

At this time, I am enclosing his letter dated February 25, 1985. I hope this eliminate any doubts you may have regarding the Court's standards as to reasonableness.

In addition, I have also taken the liberty of reviewing the Smith case cited by you as 510 F. 2d 479. The essence of the Smith case was whether or not an administrative expense allowed by the Court was a necessary expense. In that case, it was a question of brokerage commissions regarding the sale of art objects.

The majority of the Court seriously questioned the estate deduction because it determined that the commission benefited the beneficiaries rather than the estate as a whole. The minority

Decision of Judge Mulligan, however, is more in point as to both the Congressional intent and the Internal Revenue Service's rulings.

Furthermore, the Smith case is not one which has been followed; it is unique in its character; and the essence, of course, is the necessity of the expense to the estate.

In addition to the Judge's Order, I wish to cite Code Regulation 20.2053-1 (b) (2), Effect of Court Decree, which states,

> "The Decision of a local Court as to the amount allowability under local law of a claim or an administration expense, will ordinarily be accepted if the Court passes upon the facts upon which the deductibility depends."

I believe the Court has complied with that in Judge's Ciaccio's February 25, 1985 letter, not only to the extent of the deduction, but stating he would have allowed an additional $700.00.

In the event additional regulation wording is necessary, Section 20.2053-1 (b) (2) further states,

> "If the Decree was rendered by consent, it will be accepted, provided, the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the Court as satisfactory evidence upon the merits. It will be presumed that consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant."

All of the beneficiaries, were adults. All of them consented by Waiver and were furnished copies of the Accounting and informed of the amount of the fees and commissions. Each had an interest adverse to the claimant.

I firmly believe the terms of both the Code and the Regulations have been met. Consequently, the estate is entitled to the full fee

deduction. I hope you can agree, but if not, please issue a thirty-day letter so this matter proceeds to conclusion.

Very truly yours,

James M. White

JMW/kh
Enclosure

[Monroe County Surrogate's Court letterhead]

February 25, 1985

James M. White, Esq.
624 Executive Office Building
Rochester, New York 14614

Re: Estate of Helen P. Smith
Your File No. E:E:1210:JMS

Dear Mr. White:

You have asked for a review of the commission and fee approval granted by this Court in a decree of judicial settlement made July 17, 1984. In reviewing the account submitted at that time, I have noted that the total principal and interest accounted for are in excess of $455,000.

The commission for the executor was therein fixed by statute and was allowed in the amount of $17,548.13.

The attorney fee allowed in that proceeding was the sum of $16,800.

This is to advise that the fee set is in keeping with our ordinary and customary guidelines which have been followed in this Court for several years. Moreover, it conforms to the criteria established by the Court of Appeals in this state as enunciated in *Matter of Freeman*, 34 NY 2d, 1 and *Matter of Potts*, 241 NY 593. I might say, parenthetically that the attorney fee approved was some $700 less than what would have been approved. I set these matters forth fully aware that you were both executive and attorney for the estate. In those instances, I personally have been careful to attempt to keep the fees for attorney-executors below a full commission. In this particular estate, you have complied. In conclusion, I state to you that a re-review of the file and the account

submitted justify in every respect both the commission and fee approval. These are not done in an arbitrary fashion but rather as indicated following the application of the various criteria.

You are free to use this letter with respect to any taxing proceedings.

Very truly yours,
[Signature]
ARNOLD F. CIACCIO
Monroe County Surrogate

AFC:rm

[Exhibit C]
[Internal Revenue Service letterhead]

Date: December 16, 1985
In reply refer to JMS:E:E:1210

James M. White, Esq.
624 Executive Office Building
Rochester, New York 14614

Re: Estate of Helen P. Smith

Dear Mr. White:

On July 17, 1984, the Monroe County Surrogate granted to you as executor of the above named estate, executor's commissions fixed by statute in the amount of $17,548.13. In that regard, please submit, in affidavit form, a detailed account of what duties you performed in your capacity of executor.

Your responses to the above request should be received in writing by me no later than December 31, 1985.

Very truly yours,
[Signature]
James M. Serling
Attorney (Estate Tax)

[Exhibit D]

January 3, 1986

Internal Revenue Service
100 State Street
Rochester, New York 14614

ATTENTION: James M. Serling, Esq., Estate Tax Department

Re: Estate of Helen P. Smith, Your Reference No. JMS:E:E:1210

Dear Jim:

I wish to respond to the inquiry contained in your letter dated December 16, 1985, by quoting the appropriate parts of Section 2307 of the Surrogate's Court Procedure Act regarding Commissions of Fiduciaries Other Than Trustees, Sections 1 (a) (b) (c):

> On the settlement of the account of any fiduciary other than a trustee, the Court must allow him the reasonable and necessary expenses actually paid by him.... and in addition thereto, it must allow to the fiduciary for his services as fiduciary, and if there be more than one, apportion among them according to the services rendered by them respectively, the following commissions:
>
> (a) For receiving and paying out all sums of money not exceeding $100,000.00 at the rate of five percent.
>
> (b) For receiving and paying out any additional sums not exceeding $200,000.00 at the rate of four percent.
>
> (c) For receiving and paying out any additional sums not exceeding $700,000.00 at the rate of three percent.

The amount of $17,545.13 was for the commissions allowable for monies received and paid out as per Sections 1 (a) (b) (c), including principal and income.

I pray this satisfies your inquiry.

Very truly yours,

James M. White

JMW/kh

[Exhibit E]

Proposed Workpaper Adjustments to Estate Tax Return of Helen P. Smith

[Redacted]

[Exhibit F]

Statutory Notice of Deficiency

[Redacted]

650 FEDERAL SUPPLEMENT
UNITED STATES v. WHITE
Cite as 650 F.Supp. 904 (W.D.N.Y. 1987)
[904-912]

UNITED STATES of America, and James M. Serling, Estate Tax Attorney, Internal Revenue Service, Petitioners,

v.

James M. WHITE, as Attorney for and as the Executor of the Estate of Helen P. Smith, Deceased, Respondent.

Misc. No. CIV-86-140T.

United States District Court,
W.D. New York.

Jan. 7, 1987.

Federal Government petitioned for enforcement of two IRS summonses, requiring executor to substantiate deductions he claimed on federal estate tax return. The District Court, Telesca, J., held that IRS failed to show a "legitimate purpose" for requiring executor to substantiate deductions, so that Government's petition would be denied.

So ordered.

1. Internal Revenue 4508

Petition to enforce IRS summonses, and to compel executor of testator's estate to substantiate deductions he claimed on estate tax return, was not rendered moot by executor's payment of deficiency under protest. 26 U.S.C.A. §§ 7402(b), 7604(a).

2. Internal Revenue 4513

IRS failed to show a "legitimate purpose" for requiring executor to substantiate the deductions he claimed on federal estate tax return, so that petition to enforce IRS summonses would be denied, where deductions related to attorney fees claimed by executor as attorney for testator's estate, surrogate had determined that fees were reasonable based on same facts as Government would apply in deciding whether deduction would be allowed, and IRS failed to demonstrate fraud, overreaching or excessiveness by surrogate or executor. N.Y.McKinney's SCPA 2307; 26 U.S.C.A. §§ 2053(a), 7402(b), 7604(a).

3. Internal Revenue 4185

To challenge deductibility on federal estate tax return of attorney fees approved by surrogate and paid by executor, IRS must first make prima facie showing that surrogate's decision was motivated by factors other than those on which deductibility depends, such as fraud, overreaching, or excessiveness by attorney or surrogate. 26 U.S.C.A. § 2053(a).

4. Internal Revenue 3016

Federal laws dealing with taxation of decedents' estates must accommodate and yield to judicial determinations made under state law by state courts. 26 U.S.C.A. § 2053(a).

Jonathan W. Feldman, Asst. U.S. Atty., of Rochester, N.Y., Deborah S. Meland, Trial Atty., Tax Div., U.S. Dept. of Justice, Washington, D.C., for petitioners.

James M. White, Rochester, N.Y., for respondent.

DECISION and ORDER

TELESCA, District Judge.

INTRODUCTION

This action was brought on by the Government's petition for enforcement of two IRS summonses under 26 U.S.C. § 7402(b) and § 7604(a). An order to show cause was granted, Mr. White filed a Response, and the Government filed a Reply. The Monroe County Bar Association (MCBA) sought and was granted leave to file a brief *amicus curiae,* to which the Government has also filed a Response. As set forth below, I hold that Mr. White should not be compelled to obey the IRS summonses served upon him, and I dismiss this proceeding without prejudice.

FACTS

Helen P. Smith died on November 10, 1982, leaving a gross estate valued at over $455,000. Her will named respondent James M. White, Esq. as executor of the estate, and in his capacity as executor of the estate, Mr. White chose to act as the attorney for the estate as well. This is a practice permitted under New York Law. Surrogate's Court Procedure Act (SCPA) 2307. He promptly petitioned for probate of the will, and then waited the seven months required under SCPA § 1802 for any claims to be filed before the estate could be closed.

As required, Mr. White as executor filed his federal estate tax return (commonly referred to as the 706 Return). In that return, he claimed a deduction of $16,530 for his attorney's fees. He also

claimed a deduction of some $17,548.13 for the executor's commission to which he was entitled under SCPA § 2307.[1]

Although he had not received a "closing letter" from the IRS, Mr. White petitioned for judicial settlement of the estate.[2] Under SCPA § 2110, attorneys' fees can be fixed by an adversary proceeding[3], or by a judicial settlement if releases have been submitted from all legatees. In the Smith estate, Mr. White submitted releases from all nine[4] residuary legatees, one of whom was an experienced estates lawyer. The releases indicated the legatees' approval of Mr. White's accounting, which included $16,800 for his attorney's fee. After reviewing the accounting and the tax returns, on July 17, 1984, Surrogate Arnold F. Ciaccio granted a decree of judicial settlement of the Smith estate which had the

[1] SCPA 2307 provides in pertinent part that On the settlement of the account of any fiduciary ... the court must allow to him the reasonable and necessary expenses actually paid by him and if he be an attorney of this state and shall have rendered legal services in connection with his official duties, such compensation for his legal services as appear to the court to be just and reasonable and in addition thereto it must allow to the fiduciary for his services as fiduciary ... the following commissions....

[2] Under SCPA § 1804, an estate can be judicially settled before the State estate tax is final. Although § 1804 says nothing about Federal estate taxes, Treasury Regulations 20.2053-3(b) and (c) clearly contemplate the filing of the 706 return (and the concomitant deduction of any executor's commissions and attorney's fees) both before and after the decree of judicial settlement. *See also Hartwick College v. United States*, 801 F.2d 608, 613 n. 4 (2d Cir.1986).

[3] If such an adversary proceeding had taken place, Mr. White would have been required to file an affidavit detailing his efforts in this matter, under § 2230.29 of the Uniform Calendar and Practice Rules for Surrogate's Courts in the Fourth Department. As of January, 1986, a similar requirement was added by § 207.45 of the Uniform Rules for New York State Trial Courts. *See also, Estate of Gutchess*, 117 A.D.2d 852, 498 N.Y.S.2d 297 (3d Dept.1986), *app. denied*, 68 N.Y.2d 609, 501 N.E.2d 36 (1986) (administratrix of estate is "entitled to be fully apprised of the nature and extent of [the estate attorney's] services").

[4] Although Mr. White's Response (¶14) indicates that there were nine residual beneficiaries, the MCBA's brief indicates that there were twelve residuary legatees, all of whom submitted releases.

effect of settling the executor's accounting, approving the distribution of assets to those interested in the estate, and fixing and approving the executor's commissions and attorney's fees both of which were due to Mr. White. See SCPA 2307.

On August 7, 1984, petitioner Serling met with Mr. White to review the 706 return. On January 29, 1985, Mr. Serling wrote to Mr. White, stating that the Surrogate Court decree of judicial settlement did not preclude the necessity of his providing justification for the legal fees claimed. He stated that

> [e]ach case must be determined upon its own facts and circumstances taking into consideration the following factors:
>
> 1. Amount involved
> 2. Time abd [sic] effort of attorney
> 3. Seriousness of problems
> 4. Results obtained
> 5. Experience and ability of attorney
> 6. Length of administration.

He sought either Mr. White's time records or, if not available, then an itemized list of all legal work performed, time expended for each service and hourly rate charged.

Mr. White then wrote to Surrogate Ciaccio concerning the matter. Surrogate Ciaccio responded by letter to Mr. White dated February 25, 1985. That letter indicates that the executor's commission was fixed by statute, and that the attorney's fee was set:

> in keeping with our ordinary and customary guidelines which have been followed in this Court for several years. Moreover, it conforms to the criteria established by the Court of Appeals in this state as enunciated in *Matter of Freeman*, 34 NY 2d, 1 [355 N.Y.S.2d 336, 311 N.E.2d 480]

and *Matter of Potts*, 241 NY 593 [150 N.E. 568]. I might say, parenthetically that the attorney fee approved was some $700 less than what would have been approved. I set these matters forth fully aware that you were both executor and attorney for the estate. In those instances, I personally have been careful to attempt to keep the fees for attorney-executors below a full commission. In this particular estate, you have complied. In conclusion, I state to you that a re-review of the file and the account submitted justify in every respect both the commission and fee approval. These are not done in an arbitrary fashion but rather as indicated following the application of the various criteria.

Mr. White forwarded this letter to Mr. Serling with a cover letter dated February 27, 1985.

Not satisfied with this explanation, on May 1, 1985, Mr. Serling issued an IRS summons to Mr. White as executor and attorney for the estate of Helen P. Smith which sought the production of any and all records and documents relating to the administration of the estate of Helen P. Smith, including records of Mr. White's activities both as attorney and as executor. Mr. White responded with a letter dated June 5, 1985, outlining his position and refusing to permit the IRS to examine the file. On December 16, 1985, Mr. Serling wrote to Mr. White, asking him to submit, in affidavit form, a detailed account of the duties he performed in his capacity as executor. By letter dated January 3, 1986, Mr. White responded that the amount of $17,548.13 was for the executor's commissions allowable under SCPA § 2307. On February 3, 1986, Mr. Serling issued another IRS summons to Mr. White, seeking any and all records relating to Mr. White's performance of the duties of executor of the estate of Helen P. Smith.

On July 16, 1986, the IRS issued a form Letter 902(DO), notifying Mr. White that it was assessing a deficiency of $5,754.19 against the estate of Helen P. Smith. Apart from an increase in the value of stocks and bonds in the estate (which was not contested by Mr. White), the deficiency was based principally upon the disallowance of $17,176 in administration expenses, chiefly the entire amount ($16,530) of the attorney's fees claimed as a deduction. The IRS also determined that the claimed executor's commission of $17,450 should be corrected to $16,804. Mr. White states that he has paid the deficiency, with interest, and has filed a notice of claim for a refund. He also states that he does not contest the reduction in the executor's commission.

This enforcement proceeding was commenced August 12, 1986.

DISCUSSION

[1] At the outset, Mr. White argues that his payment of the deficiency renders this enforcement proceeding moot. However whether or not Mr. White has paid the deficiency, the issue remains whether the IRS is entitled to his time records so that it can independently determine the amount of any allowable deductions (notwithstanding the Surrogate's prior determination in a judicial proceeding). *See United States v. Gimbel*, 782 F.2d 89, 93 (7th Cir. 1986); *United States v. Roundtree*, 420 F.2d 845, 847 n. 3(5th Cir.1970); *see also Multistate Tax Commission v. United States Steel Corp.*, 714 F.2d 925 (9th Cir.1983), *and Marshall v. Stevens People and Friends For Freedom*, 669 F.2d 171, 174 (4th Cir. 1981), *cert. dismissed*, 455 U.S. 930, 102 S.Ct. 1297, 71 L.Ed.2d 639 (1982), *and cert. denied*, 455 U.S. 940, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982). *Cf. Carr v. United States*, 663 F.2d 59 (8th Cir.1981), *United States v. Kis*, 658 F.2d 526, 532-35 (7th Cir.1981), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982), *United States v. First American Bank*, 649 F.2d 288 (5th Cir.1981), *and United States v. Silva and Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir.1981) (actual compliance with an IRS summons *would* render an enforcement action

moot); *but cf. Gluck v. United States*, 771 F.2d 750, 753-54, n. 3 (3d Cir.1985) (*contra*). Accordingly, the petition will not be dismissed as moot.

To enforce a summons, the IRS must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 254-55, 13 L.Ed.2d 112 (1964); *United States v. MacKenzie*, 777 F.2d 811, 819 (2d Cir.1985), *cert. denied*, ___U.S.___, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986). For the reasons set forth below, I conclude that the IRS has not made the necessary showing that the investigation will be conducted pursuant to a legitimate purpose.

[2] The statute which governs the IRS's ability to determine the deductibility of estate administrative expenses is 26 U.S.C. § 2053(a), which permits the deduction of administrative expenses in "such amounts ... as are allowable by the laws of the jurisdiction ... under which the estate is being administered." An associated Treasury Regulation, § 20.2053-1(b)(2), sets forth the IRS policy in more detail:

> (2) *Effect of court decree*. The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed. For example, if the question before the court is whether a claim should be allowed, the decree allowing it will ordinarily be accepted as establishing the validity and amount of the claim. However, the decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may be rebutted by proof to the contrary. If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant....

This statute and regulation were at issue in *Estate of Smith v. Commissioner*, 510 F.2d 479 (2d Cir.1975), *cert. denied*, 423 U.S. 827, 96 S.Ct. 44, 46 L.Ed.2d 44 (1975). In *Smith*, the Second Circuit affirmed a determination of the Tax Court that no more than $750,447.74 in sales commissions were "necessary" to liquidate the estate of a sculptor, even though the Surrogate's Court of Warren County, New York had approved the payment of almost $1.6 million in commissions. Citing the above-noted Treasury Regulation, the Second Circuit stated that

> [n]ormally, therefore, a Surrogate's court decree approving expenditures by an executor as proper administrative expenses under New York law will be controlling and will not raise questions concerning possible discrepancies between § 2053 of the Internal Revenue Code of 1954 and Treas.Reg. § 20.2053-3(d)(2).

Id. at 482.

Although in *Smith* the Commissioner and the Tax Court had each made a *de novo* inquiry into the factual necessity for the expenditures, they did so because the expenditures had not been undertaken on the estate's behalf, but rather on behalf of testamentary trusts. (Mr. Smith's will had contemplated a distribution of the sculptures in kind to the trusts for the benefit of his daughters.) *Estate of David Smith*, 57 T.C. 650 (1972). It was not a case in which the Commissioner and the Tax Court refused to follow

state law which by all appearances had been properly applied by the state court, as here. The Tax Court's determination in *Smith* that only about half the sales commissions were "necessary" either to preserve the estate or pay its debts was consistent with § 11-1.1 of the New York Estates, Powers and Trusts Law (EPTL) and Treas.Reg. 20.2053-3(d)(2). Compare Treas.Reg. 20.2053-3(c)(3).

The Government points to footnote 4 in *Smith*, in which the Second Circuit quoted from the Fifth Circuit's decision in *Pitner v. United States*, 388 F.2d 651 (1967):

> "[i]n the determination of deductibility under section 2053(a)(2), it is not enough that the deduction be allowable under state law. It is necessary as well that the deduction be for an 'administrative expense' within the meaning of that term as it is used in the statute, *and that the amount sought to be deducted be reasonable under the circumstances. These are both questions of federal law* and establish the outside limits for what may be considered allowable deductions under section 2053(a)(2)." 388 F.2d at 659.

(Emphasis added.) The Government argues from this that, in the Second Circuit, the question of the amount of a deduction is a federal question which is the proper subject of an IRS inquiry.

The Government has placed undue emphasis upon this footnote. The text which the footnote accompanies indicates that the Second Circuit had declined to adopt the Surrogate's computation of commissions because the interest of the federal government (in taxing the passage of property) had not been completely or accurately reflected in the State's interests (in supervising the fiduciary responsibilities of the executor). In particular, the Second Circuit noted that there was a question as to whether some of the expenses were in fact incurred for the benefit of the estate (in accordance with the general purpose of 26 U.S.C. § 2053), or instead were incurred for the benefit of the individual beneficiaries. The Court concluded that:

> [i]n such circumstances, the federal courts cannot be precluded from reexamining a lower state court's allowance of administration expenses to determine whether they were in fact necessary to carry out the administration of the estate or merely prudent or advisable in preserving the interests of the beneficiaries.

510 F.2d at 482-83 (citations omitted).

In this case, SCPA 2307 provides for the method of calcuating executor's commissions. Thus if the statute is followed the deduction claimed for executor's commissions is "reasonable" within the meaning of *Pitner*. The same statute specifically provides that the Surrogate allow to the executor, if he be an attorney, a fee "*as it appears to the Court* to be just and reasonable..." (emphasis added).

In this case, Surrogate Ciaccio had before him Mr. White's accounting, as well as the Federal and State estate tax returns, when he approved the amount of Mr. White's attorney fee as being "just and reasonable." As he stated in his February 25, 1985 letter, he applied the criteria from *Matter of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974), and *Matter of Potts*, 241 N.Y. 593, 150 N.E. 568 (1925), in setting the amount of Mr. White's attorney's fee. *Freeman* sets forth the following factors to be used in fixing an attorney's fee:

1. Time and labor required;
2. The difficulty of the questions involved;
3. The skill required to handle the problems presented;
4. The lawyer's experience, ability and reputation;
5. The amount involved and benefit resulting to the client from the services;
6. The customary fee charged by the Bar for similar services;

7. The contingency or certainty of compensation;

8. The results obtained;

9. The responsibility involved.

34 N.Y.2d at 9, 355 N.Y.S.2d 336, 311 N.E.2d 480. The six factors which Mr. Serling would have the IRS consider are all included among the factors listed in *Freeman*. Under Treas.Reg. 20.2053-1(b)(2), then, the Surrogate having passed upon the facts upon which deductibility depends, the decision of the Surrogate should be accepted.[5]

It appears that the IRS is claiming the right to second guess the decision of the Surrogate on commissions and attorneys' fees under *any* circumstances. Such a position not only represents a

[5] The Monroe County Bar Association urges that I follow the holdings of *Estate of Park v. Commissioner of Internal Revenue*, 475 F.2d 673 (6th Cir.1973), and *Estate of Jenner v. Commissioner of Internal Revenue*, 577 F.2d 1100, 1106-07 (7th Cir.1978), and hold that, if a state probate court has determined that a particular expense is "necessary" to the administration of an estate, its determination would not be subject to review by the IRS. The MCBA argues that the Second Circuit effectively adopted this approach when it affirmed without opinion the decision in *Estate of Vatter v. Commissioner of Internal Revenue*, 65 T.C. 633 (1975), *aff'd.*, 556 F.2d 563 (1976). The MCBA also points out that this approach was adopted by the United States District Court in Nevada in *Bank of Nevada v. United States*, 80-2 U.S.T.C. ¶13,361 (1980). The Government argues that the MCBA misconstrues *Vatter*, and the *Park*, *Jenner*, and *Bank of Nevada* do not represent the law in this circuit as articulated in the *Smith* case.

I agree with the Government that *Smith*, not *Park*, *Jenner*, and *Bank of Nevada*, represents the law in this circuit. I also agree that the Tax Court in *Vatter* properly distinguished that case from *Smith*, because in *Vatter* the property in question had not been specifically devised or intended to be distributed in kind (so that the executrix was acting on behalf of the estate, not the beneficiaries, when she sold the property). Nevertheless, I believe that, under *Smith*, the IRS can review a probate court's determination that a particular expense is "necessary," but only if it first makes a showing that the probate court has, for some reason (such as fraud), not passed on the factors on which deductibility depends.

misreading of the *Smith* holding, but is also "destructive ... of the proper relationship between State and federal law...." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 480, 87 S.Ct. 1776, 1790, 18 L.Ed.2d 886 (Harlan, J., dissenting) (1967).

The Surrogate's Court in New York State, and not the IRS or the U.S. District Court, is exclusively authorized by New York law to determine the appropriate award of attorneys fees in the probating of an estate. The factors that the IRS would have this Court consider are all factors which the Surrogate *does* consider under *Freeman* and *Potts*. State courts "have an especially strong interest and a well-developed competence" to adjudicate these matters, *Giardina v. Fontana*, 733 F.2d 1047 (2d Cir.1984); *see also, Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 31-32 (2d Cir.1986), so much so that the federal courts have created their own exception to diversity jurisdiction for probate matters. *Id.; see also Byers v. McAuley*, 149 U.S. 608, 13 S.Ct. 906, 37 L.Ed. 867 (1893); *In re Broderick's Will*, 21 Wall. (88 U.S.) 503, 22 L.Ed. 599 (1875); *Hook v. Payne*, 14 Wall. (81 U.S.) 252, 20 L.Ed. 887 (1872).

Respect for the considered judgment of state courts has been expressed by federal courts over the years for other reasons as well. This respect has been based upon the courts' sense of comity and federalism, *see, e.g., Webb v. Web*, 451 U.S. 493, 499-500, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981); *Juidice v. Vail*, 430 U.S. 327, 334-36, 97 S.Ct. 1211, 1216-17, 51 L.Ed.2d 376 (1977); *423 South Salina Street, Inc. v. City of Syracuse*, 724 F.2d 26, 27 (2d Cir.1983); a view of the states as "laboratories for social and economic experiements," *Johnson v. Louisiana*, 406 U.S. 356, 376, 92 S.Ct. 1620, 1636, 32 L.Ed.2d 152 (1972) (Blackmun, J., concurring); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting); the Eleventh Amendment, *Pennhurst State School & Hosp. v. Haldermann*, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67

(1984); the Full Faith and Credit statute (28 U.S.C. § 1738), *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2d Cir.1985); and federal common-law rules of preclusion. *University of Tennessee v. Elliott*, ____U.S.____, 106 S.Ct. 3220, 3224, 3226-27, 92 L.Ed.2d 635 (1986).[6]

Justice Black described the notion of comity and the principle of federalism in *Younger v. Harris*, 401 U.S. 37, 44-45, 91 S.Ct. 746, 750-51, 27 L.Ed.2d 669 (1971) as follows:

> ... that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

[6] The Full Faith and Credit Statute, and federal common-law rules of preclusion, apply to disputes between the same parties, or of which a party has at least had notice and an opportunity to fully present its claims. The Government has not raised the point that the IRS did not have notice of the judicial settlement proceeding or an opportunity to be heard therein, and this factor was not addressed by the Second Circuit in the *Smith* case. This is presumably because (as Justice Harlan noted in his dissent in the *Bosch* case) this is not a *res judicata* or collateral estoppel question. 387 U.S. at 475, 87 S.Ct. at 1787.

In this case, the interests of the State (in determining how an attorney and an executor should be compensated for handling the probate of an estate) must be balanced against the interests of the IRS in enforcing the federal tax laws. I believe the proper balance was drawn by Justice Harlan in 1967:

> The interests of the federal treasury are essentially narrow here; they are entirely satisfied if a considered judgment is obtained from either a state or a federal court, after consideration of the pertinent materials, of the requirements of state law... [T]he federal interest requires only that the Commissioner be permitted to obtain from the federal courts a considered adjudication of the relevant state law issues in cases in which, for whatever reason, the state courts have not already provided such an adjudication. In turn, it may properly be assumed that the state court has had an opportunity to make, and has made, such an adjudication if, in a proceeding untainted by fraud, it has had the benefit of reasoned argument from parties holding genuinely inconsistent interests.

Commissioner v. Estate of Bosch, supra, 387 U.S. at 480-481, 87 S.Ct. at 1790.[7]

[7] I recognize that Justice Harlan's opinion in *Bosch* was a dissenting opinion, and that the majority in *Bosch* held that a state trial court decision would not be binding on the IRS if the IRS had not been made a party. The majority opinion in *Bosch*, however, is distinguishable in at least two respects. First, *Bosch* involved a section of the Code for which the legislative history indicated only that "proper regard" should be given to a state probate court determination, and then only when entered by a court "in a bona fide adversary proceeding." 387 U.S. at 464, 87 S.Ct. at 1787. By contrast, the Code section and regulations at issue in this case specify that the probate court decision will ordinarily be accepted, even if rendered by consent, if the court passes upon the facts upon which deductibility depends. Second, unlike *Bosch*, there has been a determination of the relevant New York law not merely by the trial court, but also by the highest court in the state, in *Freeman* and *Potts*.

(Continued on next page)

[3] I hold that the IRS cannot second-guess the decision of the Surrogate when the Surrogate has passed upon the critical facts upon which deductibility depends. to challenge such a decision, the IRS must first make a *prima facie* showing that the Surrogate's decision was motivated by factors other than those on

Footnote 7 Continued

Moreover, the underlying substantive rule in this case is based on state law and this State's highest court is the best authority on its own law. 387 U.S. at 465, 87 S.Ct. at 1782. The issue is the reasonableness of an attorney's fee and the executor's commission claimed as deductions in an estate administration proceeding. Both fees are determined by State law. Both are allowed by State statute, SCPA 2307. The executor's commission is computed by a formula contained in that statute. The attorney's fee is controlled by a standard set forth by the holding of cases before the state's highest court, *Matter of Freeman* and *Matter of Potts*. As to the standard of review of a Surrogate's exercise of discretion in fixing attorney's fees, "the statute, the cases, and the treatises suggest that the fixation of fees ... [is] discretionary without further analysis [citations omitted]." *In Re Estate of Aaron*, 30 N.Y.2d 718, 720, 332 N.YS.2d 891, 283 N.E.2d 764 (1972). The Surrogate of Monroe County properly applied the statutory and caselaw, and thus his determination would not even have been reviewable in state court, under *Aaron*. By contrast, in *Bosch*, the Probate Court of Connecticut had to make a substantive determination of the term "marital deduction" as it applied in a federal estate tax statute. *See Gallagher v. Smith*, 223 F.2d 218, 222-23 (3d Cir.1955); *Estate of Bullock*, 19 T.C.M. 1080 (1960). Thus *Bosch* supplies no authority for the IRS to seek review of the Surrogate's Decision in federal court, particularly when it could not do so in state court.

In the instant case the issue is not one of interpreting federal law. It is a case of federal tax authorities refusing to accept the determinacion of a state court of a matter involved in state administration and clearly dealt with in state law. Thus, the *Bosch* case is distinguished from the instant case. In fact, under *Bosch*, because the underlying substantive rule involved is based on state law and the state's highest court has passed on the issue, then "federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." 387 U.S. at 465, 87 S.Ct. at 1782. The federal court then sits as a state court by application of the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). *Id.*

which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate.[8] The IRS has not done so here.

I do not consider the fact that Mr. White acted as executor and attorney for the estate to be by itself evidence of fraud, overreaching, or excessiveness. That dual role is clearly permitted pursuant to SCPA 2307.[9] Whether or not that practice should continue is a matter for the New York State Legislature to decide, not Federal Court.[10]

CONCLUSION

For the reasons set forth above, the Government's motion for an order compelling enforcement of its summonses is denied, and this enforcement proceeding is dismissed. This dismissal is without prejudice, however, to a refiling by the Government should it determine that there is *prima facie* evidence of fraud,

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[8] By analogy, New York statutory and case law is very clear on the circumstances (including fraud, newly discovered evidence, or clerical error) under which a Surrogate's order can be attacked. *See, e.g.*, SCPA § 209; *In re Estate of Chodikoff*, 54 Misc.2d 785, 786, 283 N.Y.S.2d 555 (Surr.Ct., Rensselaer County 1967); *In re Estate of Heller*, 33 Misc.2d 798, 226 N.Y.S.2d 260 (Surr. Ct., N.Y.County, 1962).

[9] An attorney/executor must differentiate between the services performed in each capacity when seeking court approval of fees. *See In re Tuttle's Will*, 4 A.D.2d 310, 164 N.Y.S.2d 573 (4th Dep't 1957), *aff'd*, 4 N.Y.2d 159, 173 N.Y.S.2d 279, 149 N.E.2d 715 (1988). The reported cases collected in the Supplementary Practice Commentaries to SCPA § 2110 (McKinneys) reflect what can fairly be described as a heightened scrutiny by Surrogates for fee applications from attorney/executors.

[10] The MCBA has also argued that, because the IRS's interpretation of the Treasury Regulations is inconsistent with the plain language of the Tax Code, the regulations are invalid. As set forth above, I believe the Regulations to be consistent with the Tax Code, and the IRS's interpretation of the Regulations to be incorrect. Accordingly, like the Second Circuit in *Smith*, 510 F.2d at 483, and the Tax Court in *Vatter*, 65 T.C. 633, fn. 5, I find it unnecessary to pass on whether Treas.Reg. § 20.2053-3 is invalid.

overreaching, or some other reason to believe that the Surrogate has not passed on the factors upon which deductibility depends in this case. That burden is upon the Government.

In the absence of such evidence, the IRS must respect a decision of a Surrogate setting the amount of the attorneys' fees and the executors' commissions set forth in a proceeding judicially settling the estate and which fees (on their face) are fully in accord with the requirements of the state law, particularly where that determination takes into account all of the factors which the IRS itself would consider. The fees, having been determined in a state court proceeding by the proper application of the relevant state law which is untainted by fraud, must be respected and accepted by this Court as well as the IRS.

[4] The administration of estates is an area traditionally reserved to the states, and federal laws dealing with the taxation of decedents' estates must accommodate and yield to judicial determinations made under state law by state courts. This is not a new doctrine. An important aspect of our Constitutional blueprint creates and respects certain spheres of authority, and leaves to the people of the stats in the Tenth Amendment those responsibilities and rights not committed to federal care.

ALL OF THE ABOVE IS SO ORDERED.

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U.S. v. WHITE
Cite as 853 F.2d 107 (2nd Cir. 1988)
[107-118]

UNITED STATES of America, and James M. Serling, Estate Tax Attorney, Internal Revenue Service, Petitioners-Appellants,

v.

James M. WHITE, as attorney for and as executor of the Estate of Helen P. Smith, deceased, Respondent-Appellee.

No. 83, Docket 87-6046.

United States Court of Appeals,
Second Circuit.

Argued Sept. 3, 1987.

Decided Aug. 2, 1988.

Federal government petitioned for enforcement of two IRS summonses requiring executor to substantiate deductions he claimed on federal estate tax return. The United States District Court for the Western District of New York, Michael A. Telesca, J., 650 F.Supp. 904, denied petition, and Government appealed. The Court of Appeals, Pierce, Circuit Judge, held that: (1) Government established prima facie case for enforcement of IRS summonses; (2) IRS could investigate expenses claimed as deduction on federal estate tax return and obtain enforcement of summons, although expenses previously had been approved under state law by state trial court; (3) executor's own books and records were relevant to Internal Revenue Service's investigation; and (4) federalism and comity did not constitute substantial countervailing policy that would justify imposing requirement

upon IRS to make advance showing of fraud, overreaching, or excessiveness by executor or state trial court before allowing enforcement of summonses.

Reversed and remanded.

1. Internal Revenue 4513

Government established prima facie case for enforcement of IRS summonses to compel executor of estate to substantiate deductions he claimed on estate tax return; IRS agent submitted affidavit which averred that purpose of investigation was to determine correct tax liability, that summoned books and records were necessary, that books and records were not already in possession of IRS, and that administrative steps required by Code had been followed. 26 U.S.C.A. §7602.

2. Internal Revenue 4512

Once government has established prima facie case for enforcement of IRS summonses, burden shifts to taxpayer to disprove existence of valid tax determination purpose for IRS inquiry.

3. Internal Revenue 3016

Internal Revenue Service could investigate expenses claimed as deduction on federal estate tax return, and obtain enforcement of summonses issued to carry out investigation, although expenses had previously been approved under state law by state trial court; state trial court decrees are not determinative of federal deductibility of expenses to exclusion of any federal inquiry, and IRS may make independent assessment of deductibility of expenses under state law and assess acceptability of court decree for federal tax purposes. 26 U.S.C.A. § 2053(a)(2).

4. Internal Revenue 4496

Executor's own books and records were relevant in proceeding to enforce summons issued to carry out Internal Revenue Service's investigation of expenses claimed as deduction on federal estate tax return, despite executor's contention that only records of state trial court, which previously approved expenses, were relevant; IRS need establish no more than potential relevance of taxpayer's books and records in summons enforcement proceeding.

5. Internal Revenue 4490

In appropriate circumstances, broad latitude given IRS in use of its summons power may be restricted in light of substantial countervailing policies.

6. Internal Revenue 4508

Federalism and comity did not constitute substantial countervailing policies that would justify imposing requirement upon Internal Revenue Service to make advance showing of fraud, overreaching, or excessiveness by executor of estate or state trial court before allowing enforcement of summons issued to carry out investigation of expenses claimed as deduction on federal estate tax return, although expenses had previously been approved under state law by state trial court.

Joan I. Oppenheimer, Atty., Tax Div., U.S. Dept. of Justice, Washington, D.C. (Roger P. Williams, U.S. Atty., W.D.N.Y., Buffalo, N.Y., Roger M. Olsen, Asst. Atty. Gen., U.S. Dept. of Justice, Washington, D.C., Michael L. Paup, Charles E. Brookhart, Attys., Tax Div., U.S. Dept. of Justice, Washington, D.C., of Counsel), for petitioners-appellants.

investigating the deductibility of White's attorney's fees, as claimed on a federal estate tax return, because of a prior New York State Surrogate's Court decree that had approved White's attorney's fees under New York law. The district court held that, because (1) "the Surrogate ... passed on the facts upon which deductibility depends," 650 F.Supp. at 909; and (2) the IRS did not make a prima facie showing that the Surrogate's decision was motivated by impermissible factors "such as fraud, overreaching, or excessiveness by the attorney or the Surrogate," the IRS was therefore bound by the Surrogate's decision. *Id.* at 911.

We believe that the district court erred in concluding that the Surrogate's decree precludes the IRS from investigating the deductibility of White's attorney's fees. Because the objective of the investigation was to obtain information that may be used in determining whether there is federal tax liability, the IRS had a legitimate purpose for issuing its summonses under *Powell*. Moreover, we find the district court's summons enforcement requirement that the IRS must make a prima facie showing of "fraud, overreaching, or excessiveness by the attorney or the Surrogate" to be inconsistent with *Powell*'s holding that only a showing of a legitimate purpose, and not a showing of probable cause, is required for summons enforcement of its summonses and we therefore reverse.

BACKGROUND

The facts of this case are set forth in full in the district court's opinion, reported at 650 F.Supp. 904. We refer herein only to those facts necessary to address the issues presented on appeal. In July 1984, the Surrogate's Court of Monroe County, New York, granted a decree of judicial settlement of the Estate of Helen P. Smith. Under New York law, *see* N.Y.Surr.Ct. Proc.Act § 2307 (McKinney 1967 & Supp. 1988), this decree had the effect, *inter alia*, of approving attorney's fees of $16,800 and an executor's

commission of $17,548.13. James M. White, the respondent-appellee, was both the executor and the attorney for the estate. He filed a federal estate tax return which claimed deductions of $16,530 for his attorney's fees and $17,450 as the executor's commission.

In August 1984, petitioner-appellant James M. Serling, a tax attorney for the IRS, met with White to review the estate tax return. White informed Serling that the Surrogate had signed a judicial decree of settlement for the estate. In January 1985, Serling wrote to White requesting his time records or other documentation of legal work undertaken for the estate, stating that White was required to provide justification for his attorney's fees notwithstanding the Surrogate's decree. In February 1985, White responded by forwarding a letter he had obtained from the Surrogate which stated that White's attorney's fees were valid under New York law.

Pursuant to the IRS's summons authority under § 7602 of the Internal Revenue Code of 1954 ("I.R.C." or the "Code"), 26 U.S.C. § 7602 (1982), Serling then sent two summonses to White, one in May 1985 and one in February 1986. The May 1985 summons sought all records and documents relating to the administration of the estate, including records of White's activities as attorney and as executor. The February 1986 summons sought all records relating to White's performance of his duties as executor of the estate. White refused to comply with the summonses, relying on the Surrogate's prior approval of his attorney's fees under New York law. Based on this refusal, the IRS issued a deficiency note to White on behalf of the estate in July 1986 which disallowed the claimed attorney's fees and reduced the executor's commission from $17,450 to $16,804. Apparently, White does not contest the reduction in the executor's commission. White paid the deficiency in the amount of $5,754.19 and filed a notice

DISCUSSION

I

The issue presented to us is whether the IRS may investigate expenses claimed as a deduction on a federal estate tax return, and obtain enforcement of summonses issued to carry out such an investigation, where the subject expenses previously had been approved under state law by a state trial court. The government argues that the district court erred in denying its petition for summons enforcement because the summonses were validly issued under the authority of § 7602 of the Internal Revenue Code of 1954 and because the IRS had met its burden of showing that they were issued for a legitimate investigative purpose, in accordance with the requirements of *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964), for judicial enforcement of summonses.

The IRS is authorized to issue summonses, *inter alia*, "to examine any books, papers, records, or other data which may be relevant or material" to an inquiry "[f]or the purpose of ascertaining the correctness of any return." I.R.C. § 7602. In enacting § 7602 of the Code, Congress endowed the IRS with "expansive information-gathering authority" in order to encourage effective tax investigations. *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S.Ct. 1495, 1502, 79 L.Ed.2d 826 (1984). Because the summons authority is "necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code," *United States v. Euge*, 444 U.S. 707, 711, 100 S.Ct. 874, 878, 63 L.Ed.2d 141 (1980), the Supreme Court has consistently held that restrictions on the IRS's summons power should be avoided "absent ambiguous directions from Congress." *United States v. Bisceglia*, 420 U.S. 141, 150, 95 S.Ct. 915, 921, 43 L.Ed.2d 88 (1975); *see also Euge*, 444 U.S. at 711, 100 S.Ct. at 878 (the summons authority "should be upheld

should deny enforcement of the summons, since any other result would constitute an abuse of the court's process. *Powell*, 379 U.S. at 58, 85 S.Ct. at 255. If the taxpayer fails to meet his burden, then enforcement should be granted. *Id.*

Subsequent cases have held that the government's burden of proof of its compliance with the *Powell* standards is minimal, *see United States v. Davey*, 543 F.2d 996, 1000 (2d Cir.1976); *United States v. Balanced Financial Management, Inc.*, 769 F.2d 1440, 1443 (10th Cir.1985), and that the government may even establish its prima facie case by the affidavit of an agent involved in the investigation averring each *Powell* element. *See Alphin v. United States*, 809 F.2d 236, 238 (4th Cir.), *cert denied*, ____U.S.____, 107 S.Ct. 1578, 94 L.Ed.2d 768 (1987); *United States v. Kis*, 658 F.2d 526, 536 (7th Cir.1981), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982). In contrast, the taxpayer's burden of proof to establish that enforcement would be improper is significantly greater than the burden on the government to show a legitimate purpose. *Kis*, 658 F.2d at 535. In the words of the Supreme Court, the taxpayer's burden is a "heavy" one, which he must meet by "disprov[ing] the actual existence of a valid civil tax determination or collection purpose by the Service." *LaSalle*, 437 U.S. at 316, 98 S.Ct. at 2367.

The imposition of a heavier burden on the taxpayer in a summons enforcement proceeding is intended to facilitate the IRS's investigative process. *Kis*, 658 F.2d at 535. Summons enforcement proceedings are intended to be summary in nature so that an investigation can advance to an ultimate determination as to whether tax liability exists. *Id*. These proceedings generally occur at the early investigative stage of any tax inquiry involving a taxpayer, when no guilt or liability of the taxpayer has been established. *Id*. Therefore, the primary issue presented by a summons proceeding is *not* whether the IRS has established, or is even likely to establish guilt or liability on the taxpayer's part; rather,

the issue is whether the IRS had a valid tax determination or collection purpose in issuing its summons.

II

In determining the enforceability of the summonses herein, we must consider whether the government met the four-part test under *Powell*, and, if it did, whether White demonstrated that enforcing the summonses would constitute an abuse of the court's process. We consider first whether the government met its burden of proof under *Powell*.

A. *The Government's Burden of Proof*

[1] The government's petition for enforcement was supported by IRS Agent Serling's affidavit, which averred that (1) the purpose of his investigation was to determine the correct tax liability of the Estate of Helen P. Smith; (2) the summoned books and records were necessary for this purpose; (3) the books and records were not already in the possession of the IRS; and (4) the administrative steps required by the Code had been followed. Just on the basis of this affidavit, it is clear that the government did establish a prima facie case for enforcement. *See, e.g., Sancetta*, 788 F.2d at 71; *United States v. Beacon Hill Fed. Sav. & Loan*, 718 F.2d 49, 52 (2d Cir.1983); *Kis*, 658 F.2d at 536-37.

The declared purpose of the subject investigation is unquestionably legitimate under § 7602, which authorizes the issuance of summonses "[f]or the purpose of ascertaining the correctness of any return." Contrary to White's argument that the purpose must be stated with more specificity, the IRS is required to declare only a "good-faith pursuit of the congressionally authorized purposes of § 7602," *LaSalle*, 437 U.S. at 318, 98 S.Ct. at 2368. This we believe the IRS has done.

dispute. Nor does White assert that the Surrogate's decree is binding on the IRS based on the full faith and credit provision of 28 U.S.C. § 1738, or based on principles of re judicata and collateral estoppel. Rather, he asserts that, as a matter of law, there is no need for him to produce his records because the IRS is constrained by relevant Code and regulatory provisions to accept the Surrogate's decree.

In agreeing with White that the IRS is bound by the Surrogate's decree, the district court relied primarily on Treas.Reg. § 20.2053-1(b)(2) and not its associated statute, I.R.C. § 2053(a)(2). Nonetheless, we must first examine the statute to determine whether there exists evidence of "unambiguous directions from Congress," *Bisceglia*, 420 U.S. at 150, 95 S.Ct. at 921, restricting the IRS's summons power when a state court applying state law has found "allowable" the attorney's fees that are the subject of IRS scrutiny.

1. I.R.C. § 2053(a)(2)

Section 2053(a) of the Code sets forth certain deductions allowable in determining the value of a taxable estate. In relevant part, § 2053(a) authorizes deductions of such amounts for administrative expenses "as are allowable by the laws of the jurisdiction ... under which the estate is being administered." I.R.C. § 2053(a)(2). White interprets the statute as making state court decrees which approve administrative expenses under state law conclusive and binding on the IRS; this, by inference, would render subsequent tax investigations of such expenses pointless.

We do not read the statute as giving state *trial* court decrees preclusive effect with regard to IRS investigations. To be sure, the plain language of § 2053(a)(2) indicates that the federal deductibility of estate administrative expenses is governed by state law. Thus, under this statute, the state rules applicable to the allowability of these expenses have been "absorbed" as the relevant federal rules relating to the deductibility of such expenses. *See* C. Wright, The Law of Federal Courts § 60, at 94-95 (4th ed. 1983) ("sometimes the federal statute will direct that state law be applied," in which case "the state rule has merely been absorbed as the relevant federal rule"). Although the statute directs the IRS and federal courts to apply state rules, the deductibility of such expenses nonetheless remains a federal question. The statute does not address the effect of state trial court approval of estate administrative expenses under federal law. In the absence of preclusive language in the statute, we are not persuaded that Congress unambiguously intended to make state trial court decrees determinative of the federal deductibility of such expenses to the exclusion of any federal inquiry.

Moreover, any suggestion that Congress intended to preclude IRS investigation into the deductibility of White's fees under state law is untenable in light of the Supreme Court's reasoning in *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967). In *Bosch*, the Supreme Court addressed the problem of what effect must be given a state trial court decree where the issue addressed by such decree has federal estate tax consequences. *Id.* At issue in *Bosch* was a federal estate tax deduction whose validity under I.R.C. § 2056(b)(5) depended on the invalidity under state law of an instrument executed by the decedent's wife. In a separate proceeding, to which the IRS was not a party, a state trial court held the instrument invalid, which conclusion was disputed by the IRS with regard to the claimed federal estate tax deduction.

In considering the effect of the state court determination in a subsequent federal tax proceeding, the Supreme Court found that Congress, in enacting I.R.C. § 2056(b)(5), had intended to give "proper regard" and not "finality" to the interpretations of state law by state trial courts. "If the Congress had intended state trial court determinations to have [a conclusive and binding]

effect on the federal actions, it certainly would have said so—which it did not do." 387 U.S. at 464, 87 S.Ct. at 1782. Using diversity cases as its guide, the *Bosch* court applied the rule of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), that a federal court will give effect to a state court decree, if at all, "only after *independent examination* of the state law as determined by the highest court of the State." 387 U.S. at 463, 87 S.Ct. at 1781 (emphasis added). Consequently, the Supreme Court concluded in *Bosch* that "when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should ... not be controlling." *Id.* at 465, 87 S.Ct. at 1782. While federal authorities are bound to apply state law as determined by the state's highest court, they need only give "proper regard" to relevant rulings of other courts in the state and "may be said to be, in effect, sitting as a state court." *Id.* In *Bosch*, therefore, the Court found that the IRS was entitled to make an independent assessment as to the validity *vel non* of the instrument under applicable state law as determined by the state's highest court.

[3] We believe the ruling in *Bosch* supports the view that the Surrogate's decree is not conclusive and binding on the IRS under I.R.C. § 2053(a)(2). Like the statutory provision at issue in *Bosch*, I.R.C. § 2053(a)(2) gives no indication that Congress intended the Surrogate's decision to be preclusive. We conclude that, with regard to the federal deductibility of White's fees, the IRS is entitled to make an independent assessment of the validity of White's fees under applicable state law as determined by the state's highest court. Contrary to White's claim, the mere fact that the Surrogate issued a decree does not preclude the IRS from investigating the deductibility of White's fees under state law.

The district court in this case interpreted *Bosch* differently. Because the New York Court of Appeals has already set forth the factors to be considered when determining the validity of attor-

ney's fees in estate practice, *see In re Estate of Freeman*, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 (1974), and since the Surrogate's letter to White stated that that it had applied these factors, the district court concluded that the IRS is bound by the Surrogate's decision. 650 F.Supp. at 911 n. 7. We do not agree with this interpretation of *Bosch*. The *Erie* approach taken in *Bosch* assumes that state law, as announced by the state's highest court, is to be followed by both the state trial court and federal authorities. However, even assuming that the state trial court properly applied such state law, the *Bosch* court found that "when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should ... not be controlling." 387 U.S. at 465, 87 S.Ct. at 1782. Rather, federal authorities may make an independent examination of the state law as determined by the highest court of the state. *Id.* at 463, 87 S.Ct. at 1781-82. In this case, although the IRS is bound by the *factors* established by the New York Court of Appeals in *Freeman*, it is not bound by the Surrogate's application of these factors. Rather, according to *Bosch*, the Surrogate's ruling only need by given "proper regard" as one court's interpretation of applicable state law.

White and at least one amicus argue that the New York Court of Appeals may not overturn the Surrogate's factual determination of reasonableness, that as a practical matter that Court does not hear appeals from the Surrogate's determinations of fees, and that it has "delegated" its power to the Surrogate. While all this may be true, under New York law the Court of Appeals retains the authority to review a Surrogate's decision to ensure that it complies with New York law. That the Court rarely exercises its prerogative does not deprive the federal authorities of their jurisdiction to consider the same issues.

Subsequent to *Bosch*, we have stated that, even if proper regard is accorded to a state court's adjudication, "it would only

be as valid as its evidentiary base," and that "[w]e have not hesitated to disregard state court judgments affecting federal tax liability where the factual questions involved were not contested in state court, *see Lowe v. Commissioner*, 510 F.2d 479 (2d Cir.), *cert. denied*, 423 U.S. 827, 96 S.Ct. 44, 46 L.Ed.2d 44 (1975), or where a lower state court made an erroneous application of state law, *see Cheng Yih-Chun v. Federal Reserve Bank*, 442 F.2d 460 (2nd Cir.1971)." *United States v. Bosurgi*, 530 F.2d 1105, 1112 (2d Cir.1976). It follows that the IRS is entitled to make an initial assessment of the "proper regard" to be accorded a state trial court decree in a particular case.

We note that, at this summons enforcement stage, the validity of the Surrogate's decree is not at issue. Since the purpose of a summons is "not to accuse, but to inquire," *Bisceglia*, 420 U.S. at 146, 95 S.Ct. at 919, the IRS is merely seeking to inquire into the factors that have a bearing on the deductibility of White's fees—this is not the same as accusing the Surrogate of error. Thus, our discussion of *Bosch* and subsequent cases is intended solely to demonstrate that, contrary to White's claim, the IRS may indeed *inquire* under § 2053 into the allowability of White's fees under state law.

On the basis of the plain language of § 2053(a)(2) and the Supreme Court's reasoning in *Bosch*, we conclude that there is no *statutory* support for White's proposition that the Surrogate's decree is binding on the IRS in subsequent federal tax proceedings nor for the assertion that the statute bars the IRS from investigating the deductibility of White's attorney's fees. As previously mentioned, however, the district court found support for White's proposition primarily in the statute's associated regulation, Treas.Reg. § 20.2053-1(b)(2), which we consider next.

2. *Treasury Regulation § 20.2053-1(b)(2)*

Treasury Regulation § 20.2053-1(b)(2), which is entitled "Effect of Court Decree," provides in relevant part:

> The decision of a local court as to the amount and allowability under local law of a claim or administration expense will *ordinarily* be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed.... If the decree was rendered by consent, it will be accepted *provided* the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits.... The decree will not be accepted if it is at variance with the law of the State ... (emphasis added).

The district court concluded in light of this regulation that (1) the Surrogate having passed upon the facts upon which deductibility depends, and (2) in the absence of a prima facie showing by the IRS that the Surrogate's decision was motivated by factors other than those upon which deductibility depends, "such as fraud, overreaching, or excessiveness by the attorney or the Surrogate," the IRS was bound by the Surrogate's decision. 650 F.Supp. at 909. The district court therefore accepted White's claim that an IRS investigation of the deductibility of his fees would be pointless and hence it found that the IRS summonses were not issued for a legitimate purpose.

We believe that the district court erred in concluding that this regulation precludes the IRS from investigating the deductibility of White's fees under state law. The regulation merely parallels and elaborates on its related statute, I.R.C. § 2053(a), and therefore, the principles discussed in *Bosch* are as applicable in the context of the regulation as they are in the statutory context. In stating that a local court decree "will not be accepted if it is at variance with the law of the State," the regulation, like the statute, when read in conjunction with *Bosch*, makes it clear that the IRS is entitled to make an independent assessment of applicable

state law as interpreted by the state's highest court. Contrary to the district court's conclusion, and by analogy to *Bosch*, the regulation does not preclude the IRS from independently assessing the deductibility of White's fees under state law.

Moreover, the regulation authorizes the IRS to determine, prior to acceptance of a local court decree, whether or not that decree is at variance with state law. For instance, a local court decree may be at variance with state law if, in the district court's words, "the Surrogate's decision was motivated by factors other than those upon which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate." The decree may also be at variance with state law if the local court did not pass on the facts upon which deductibility depends; or if the consent given was not a bona fide recognition of the validity of the claim—these are questions regarding the proper application of state law that the regulation itself sets forth as standards to determine when the IRS should accept a local court decree. Also, these standards are consistent with our prior statement that a state court decree "would only be as valid as its evidentiary base" and may be disregarded "where [it is determined that] a lower state court made an erroneous application of state law." *Bosurgi*, 530 F.2d at 1112.

From the language of the regulation, it is clear that, while the IRS may "ordinarily" accept a local court decree, it is not required to do so if the decree did not properly apply state law. Rather, the regulation permits the IRS to make an independent assessment of the deductibility of White's fees under state law and to assess the acceptability of the Surrogate's decree for federal tax purposes. Since neither I.R.C. § 2053 nor Treas.Reg. § 20.2053-1(b)(2) precludes the IRS from investigating the deductibility of White's fees under state law, we conclude that White has failed to meet his burden of disproving the existence of a legitimate tax determination purpose.

The district court erred in requiring, as a prerequisite for summons enforcement, that the IRS make a prima facie showing that the Surrogate's decision was motivated by impermissible factors "such as fraud, overreaching, or excessiveness by the attorney or the Surrogate." This requirement is virtually the same as that advanced by the taxpayer in *Powell*, namely, that the IRS must make an advance showing of probable cause to suspect fraud. In *Powell*, the Supreme Court rejected such a standard because "it might seriously hamper the Commissioner in carrying out investigations he thinks warranted, forcing him to litigate and prosecute appeals on the very subject which he desires to investigate." 379 U.S. at 54, 85 S.Ct. at 253. Since we believe that the district court's requirement would be equally likely to hamper the IRS in carrying out investigations it thinks are warranted, and has already forced the IRS to litigate and prosecute an appeal on the very subject it desires to investigate, we reject the district court's new standard for enforcement of summonses as an invalid restraint on the summons power of the IRS.

Finally, the district court prematurely considered and decided the issue of whether the Surrogate "passed on the facts upon which deductibility depends." As previously stated, at this summons enforcement stage, the validity of the Surrogate's decree is not at issue. Rather, the IRS seeks to *inquire* into the facts that bear on the deductibility of White's fees, and not to accuse the Surrogate of error. *See Bisceglia*, 420 U.S. at 146, 95 S.Ct. at 918-19. Indeed, as far as we know, no record evidence, as such, had been presented to the district court that would have enabled it to decide whether the Surrogate passed on the facts upon which deductibility depends. The post hoc letter from the Surrogate justifying its decision is not sufficient to eliminate inquiry into whether the Surrogate actually considered the appropriate facts.

The function of the district court and of this Court in an enforcement proceeding is not to test the final merits of the

claimed tax deduction, but to assess within the limits of *Powell* whether the IRS issued its summons for a legitimate tax determination purpose. We conclude from our review of I.R.C. § 2053 and its associated regulation that, contrary to White's claim, the IRS has a legitimate purpose in investigating the deductibility of his fees. We further conclude that White has failed to meet his "heavy" burden of disproving the existence of a legitimate tax determination for the IRS investigation.

3. *Relevance*

[4] In rebuttal to Serling's declaration of relevance, White argues that, even if the IRS may conduct an investigation, the only books and records that would be relevant to such an investigation are those of the Surrogate's Court, not his own. We disagree. In *United States v. Arthur Young & Co.*, 465 U.S. 805, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984), the Supreme Court stated:

> The language "may be" [in § 7602] reflects Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation.... The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until they are procured and scrutinized. As a tool of discovery, the § 7602 summons is critical to the investigation and enforcement function of the IRS; the Service therefore should not be required to establish that the documents it seeks are actually relevant in any technical, evidentiary sense.

Id. at 814, 104 S.Ct. at 1501 (emphasis in original). Clearly, White's books and records have "potential" relevance to an investigation to ascertain the deductibility of his fees under state law. The IRS need not establish more than that in a summons enforcement proceeding.

C. *Countervailing Policies*

[5] Thus far, White has failed to demonstrate that enforcement of the IRS summonses would constitute an abuse of the court's process. However, that does not automatically entitle the IRS to enforcement of its summonses; other considerations may bear on their enforceability. *See United States v. Arthur Young & Co.*, 677 F.2d 211, 219 (2d Cir.1982), *rev'd on other grounds*, 465 U.S. 805, 104 S.Ct. 1495, 79 L.Ed. 826 (1984). In appropriate circumstances, the broad latitude given the IRS in the use of its summons power may be restricted in light of "substantial countervailing policies." *Euge*, 444 U.S. at 711, 100 S.Ct. at 878. The district court herein found that, in addition to the relevant statutory and regulatory provisions, principles of comity and federalism argued against allowing the IRS to "second-guess" the Surrogate's decisions. 650 F.Supp. at 909. As examples of the respect accorded state judgments by federal courts, the district court cited, *inter alia*, the eleventh amendment, the full faith and credit statute and federal common law rules of preclusion.

In establishing what it considered to be the proper balance between federal and state interests in this proceeding, the district court relied on Justice Harlan's dissent in *Bosch*. *Id.* at 910. In *Bosch*, Justice Harlan stated:

> the federal interest requires only that the Commissioner be permitted to obtain from the federal courts a considered adjudication of the relevant state law issues in cases in which ... the state courts have not already provided such an adjudication. In turn, it may properly be assumed that the state court has had an opportunity to make, and has made, such an adjudication if, in a proceeding untainted by fraud, it has had the benefit of reasoned argument from parties holding genuinely inconsistent interests.

387 U.S. at 480-81, 87 S.Ct. at 1790-91. Relying on Justice Harlan's reasoning, the district court formulated a new standard

for enforcement of a summons: in order to "challenge" a decision of the Surrogate when the Surrogate has passed on the facts upon which deductibility depends, "the IRS must make a prima facie showing that the Surrogate's decision was motivated by factors other than those on which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate." 650 F.Supp. at 911. However, it is the reasoning of the majority in *Bosch,* and not that of the dissent, that is controlling.

[6] On the facts presented, we are not persuaded that federalism and comity constitute a "substantial countervailing policy" that would justify imposing a requirement upon the IRS to make an advance showing of factors "such as fraud, overreaching, or excessiveness by the attorney or the Surrogate" before granting enforcement of its summonses. Unquestionably, in proper circumstances, federal courts are bound to respect the considered judgment of state courts. However, the facts of this case do not implicate the eleventh amendment, full faith and credit, principles of collateral estoppel, or other doctrines arising from principles of federalism and comity; consequently, federal authorities are not bound to give preclusive effect to the Surrogate's decree.

Instead of substantial countervailing policies, we find in I.R.C. § 7602 "a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry." *Arthur Young,* 465 U.S. at 816, 104 S.Ct. at 1502 (emphasis in original). The Supreme court informs us that "In light of this explicit statement by the Legislative Branch, courts should be chary of recognizing exceptions to the broad summons authority of the IRS.... If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, and not this Court, to make." *Id.* at 816-17, 104 S.Ct. at 1502.

CONCLUSION

While we appreciate the concern of the amici and acknowledge that one may well wonder whether the IRS in the Buffalo area is allocating wisely the time and effort of its limited staff, nevertheless, in the absence of substantial countervailing policies, and in the absence of a showing that enforcement of the summonses would constitute an abuse of the court's process, we conclude that the IRS is entitled to enforcement of its summonses. Accordingly, we reverse and remand with directions that the district court grant the petition for enforcement.

PETITIONER'S

BRIEF

7

No. 88-928

In The Supreme Court of the United States

OCTOBER TERM, 1989

JAMES M. WHITE, AS ATTORNEY FOR
AND AS THE EXECUTOR OF
THE ESTATE OF HELEN P. SMITH, DECEASED,
Petitioner,

vs.

UNITED STATES OF AMERICA AND
JAMES M. SERLING, ESTATE TAX
ATTORNEY, INTERNAL REVENUE SERVICE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED DECEMBER 2, 1988
CERTIORARI GRANTED FEBRUARY 27, 1989

55 PP

QUESTION PRESENTED

Is the Internal Revenue Service entitled to enforcement of a summons demanding an estate attorney's workfile and time records,

— where the only purpose of the investigation is to enable the IRS to review and determine *de novo* the reasonable value of his services to the estate and to limit the estate's deduction for attorneys' fees accordingly, and

— where the estate has already paid an attorney's fee under a decree and order of the New York Surrogate's Court, a court of record, that set the fee in its discretion under settled principles announced by New York's highest court?

LIST OF PARTIES

The names of all parties are set forth in the caption.

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In The

Supreme Court of the United States

October Term, 1989

JAMES M. WHITE, as attorney for and as the Executor of the Estate of Helen P. Smith, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA and JAMES M. SERLING, Estate Tax Attorney, Internal Revenue Service,

Respondents.

On Writ of Certiorari to The United States Court of Appeals For the Second Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (reproduced in the Joint Appendix ("J.A.")) is reported at 853 F.2d 107 (2d Cir. 1988). J.A. 62-85. The opinion of the District Court is reported at 650 F. Supp. 904 (W.D.N.Y. 1987). J.A. 43-61.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 2, 1988. (See Appendix to Petition for Certiorari, p. 1). The petition for a writ of certiorari was filed on December 2,

1988 and was granted on February 27, 1989. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following constitutional provisions, statutes, and regulations are involved in this proceeding:

1. *Internal Revenue Code* § *2053(a):*

§ **2053. Expenses, indebtedness, and taxes**

(a) General rule.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

(1) for funeral expenses

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortgages . . . ,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

2. *Internal Revenue Code* § *7602(a):*

§ **7602. Examination of books and witnesses**

(a) Authority to summon, etc.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

3. *Constitution of the State of New York art. 6,* § *12(d):*

§ **12.**

. . . .

d. The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.

4. *New York Surrogate's Court Procedure Act* § *201(3):*

§ **201. General jurisdiction of the surrogate's court**

. . . .

3. The court shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party

and any other person having any claim or interest therein, over whom jurisdiction has been obtained as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

5. ***Treasury Regulation* § *20.2053-1(b)(2):***

The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed. . . . If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. . . . The decree will not be accepted if it is at variance with the law of the State . . .

STATEMENT OF THE CASE

The case arose because a Rochester, New York lawyer, petitioner James M. White, believed that Internal Revenue Service auditors had no legitimate reason to subpoena his file and time records for an estate he had represented. The district court agreed with attorney White (J.A. 43), but the Second Circuit Court of Appeals reversed and ordered that the IRS summonses be enforced (J.A. 62).

The late Helen P. Smith, who lived in Monroe County, State of New York, died in November, 1982, leaving an estate of approximately $450,000. J.A. 38. Petitioner White, an experienced general practitioner, was retained as both executor and attorney for the estate (J.A. 10), as expressly permitted by New York statute. N.Y. Sur. Ct. Proc. Act § 2307.

White applied himself to the matter expeditiously and effectively. Within a month after Mrs. Smith's death, attorney White obtained a decree of probate from the Monroe County Surrogate. The decree was based on a petition he had filed to probate her Will and First Codicil, affidavits of attesting witnesses, and waivers and consents from four out-of-state distributees. White then collected the assets of the estate, which included numerous securities and cash accounts. Among other tasks, he paid various cash legacies and distributed moneys to a dozen residuary legatees. He caused the estate to make a timely alternate valuation election and prepared and filed federal and state estate tax returns. J.A. 45-46.

On July 17, 1984, after preparing and submitting a detailed accounting, White obtained a decree of judicial settlement from Monroe County Surrogate Arnold F. Ciaccio. J.A. 14. The decree included an express direction that White be paid the statutory fee as executor of the estate and that he receive the sum of $16,800 for legal services rendered "for the benefit of the Estate." Each of the twelve residuary legatees had been furnished a copy of the accounting, which had specifically requested the fee, and each legatee had consented in writing to payment of the requested fee. J.A. 46.

The Surrogate's Court in New York State, like its sister probate courts in many other state systems, is a specialized court of record whose principal role is to oversee the administration of local estates. N.Y. Constitution art. 6, § 12(d); N.Y. Sur. Ct. Proc. Act § 201(3). No other lawyer or judicial officer is better placed than the local Surrogate to observe and appreciate the role of local lawyers in estate practice. From his experience, and from reviewing the documents filed in Surrogate's Court, a Surrogate Judge can assess the responsibility assumed by an attorney for an estate of this size and complexity, the steps needed to be taken, and the time they require. He can also see whether the attorney

carried out those responsibilities promptly and effectively. Finally, because he must approve attorneys' fees for every estate in which judicial settlement is sought, a Surrogate Judge is familiar with local community practice regarding attorneys' fees for services rendered in estate matters.

The tax return for the Smith estate listed deductions for the executor's fee and the attorney's fee as approved by the Monroe County Surrogate. J.A. 30. The documents on file with the Surrogate's Court verified that the fees had actually been ordered and paid to White. J.A. 21.

Several months later, the Internal Revenue Service undertook an audit of the Smith estate tax return. In the course of the audit, the IRS wrote to White demanding documentation of the basis for the executor's and attorney's fees taken as deductions. The IRS wanted to review the reasonableness of the fee amount approved by the Surrogate (J.A. 32), and to do so it demanded his time records of work on the estate. In the alternative, the IRS demanded a list of acts performed for the Smith estate, time spent on each task, and hourly rates. J.A. 32-34.

White could see what these demands portended. For the past several years IRS auditors in western New York and elsewhere had made a general practice of demanding records and timesheets from estate attorneys, then disallowing portions of deductions for their fees, even where the fees had previously been allowed by state court order.[1] White realized, therefore, that notwithstanding the Surrogate's decree, the IRS intended to decide for itself what his services as a lawyer for the estate were worth, based primarily on his timesheets, and to limit the estate tax deduction accordingly.

[1] It was the perceived unfairness of this widespread practice that led the various bar associations to appear in this court and in the courts below as *amicus curiae* in order to support White's stand in this case.

As he saw it, however, his time records and hourly rates did not bear on the reasonableness of his fee under New York law, or the deductibility of his fee; the only issue that could possibly concern the IRS was whether his fee had been approved under New York law by the Monroe County Surrogate. He explained his position to the IRS at length. J.A. 29-31, 35-37.

White buttressed his position by obtaining a February 25, 1985 letter from the Surrogate's Court that addressed the question of the attorney's fee in the Smith estate. The Surrogate's letter stated:

> This is to advise that the fee set is in keeping with our ordinary and customary guidelines which have been followed in this Court for several years. Moreover, it conforms to the criteria established by the Court of Appeals in Matter of Freeman, 34 N.Y.2d 1 and in Matter of Potts, 241 N.Y. 593. . . . In conclusion, I state to you that a re-review of the file and account submitted justify in every respect both the commission and the fee approval. These are not done in an arbitrary fashion but rather as indicated following the application of various criteria.

J.A. 38. The IRS was unmoved. White was served with one IRS summons, then another, demanding the previously requested records. J.A. 5, 7. White appeared in person and later by a representative (J.A. 14, 18), but respectfully declined to comply. The IRS eventually disallowed the attorney's fee deduction in its entirety and assessed an estate tax deficiency against the estate.

Decisions of the District Court and Court of Appeals

In the meantime, the IRS commenced a proceeding in United States District Court to enforce its summonses. The matter came before Hon. Michael A. Telesca, U.S.D.J. (who himself had served as Monroe County Surrogate Judge for many years until he was appointed to the federal bench).

The district judge issued a considered Decision and Order in which he declined to enforce the summonses. J.A. 43-61. He ruled that the IRS's objective of making an independent determination of the reasonableness of the executor's fee and the attorney's fee awarded to White was not a proper purpose for an investigation that demanded an attorney's time records and workfile. He held that the IRS was bound to accept the determination of a state probate court which had applied state law as pronounced by the state's highest court. In the district court's view, the IRS's position that it could collaterally review a Surrogate's Court determination violated principles of federalism. 650 F. Supp. 904 (W.D.N.Y. 1987) (J.A. 55-57).

The Second Circuit Court of Appeals reversed and directed that the summonses be enforced. 853 F.2d 107 (2d Cir. 1988) (J.A. 62). In the court's view, the IRS had made a prima facie case for enforcement merely by alleging in a conclusory affidavit that its investigation sought to determine the tax liability of the Smith estate, that it needed the subpoenaed books and records for that purpose, and that it did not already have them. J.A. 72-73.

The court rejected White's argument that enforcement was improper because there was no valid purpose for these particular summonses. The court held that the decree of the Surrogate alone did not establish the deductibility of the estate's attorney's fee under section 2053(a) of the Internal Revenue Code. J.A. 74-75. Furthermore, the court interpreted *Commissioner v. Estate of Bosch*, 387 U.S. 456, 18 L. Ed. 2d 886 (1967), to entitle the IRS to make "an independent assessment" of the validity of the attorney's fee under state law on the ground that the Surrogate's decree came from a mere trial-level court, not from New York's highest court. J.A. 75-78.

Finally, the Court of Appeals found no danger that collateral review by the IRS of the fee amount approved by the Surrogate

would cast disrespect on the considered judgment of a state court. (J.A. 84).

White moved in the Second Circuit for rehearing in banc, emphasizing that the decision of the panel, in sanctioning collateral review of discretionary attorneys' fee awards under I.R.C. § 2053, was in conflict with decisions of the Courts of Appeal for the Sixth and Seventh Circuits.[2] The court denied reargument without opinion.

SUMMARY OF ARGUMENT

The Second Circuit Court of Appeals erred in holding that the IRS is entitled to second-guess a state probate court's allowance of attorneys' fees and to allow a federal estate deduction for only so much of an attorneys' fee as the IRS deems proper. Petitioner White met his burden of showing that the *only* purpose of the summonses he has challenged is to enable the IRS to review the Surrogate's exercise of discretion. Since that purpose is improper, the district judge properly denied enforcement.

The IRS purpose is improper because section 2053(a) of the Internal Revenue Code authorizes a deduction for administration expenses that are "allowable" under local law. Consistent with its history and the congressional intent as reflected in the statute as a whole and as held by the Sixth and Seventh Circuit Courts of Appeal, section 2053(a) should be construed to entitle a taxpayer to deduct the same fee amount that a state probate court orders the taxpayer to pay.

The construction of the statute urged by the government would result in unnecessary and futile attempts by the IRS to duplicate the work of state courts. In New York, discretionary fee determi-

[2] See *Estate of Jenner v. Commissioner*, 577 F.2d 1100 (7th Cir. 1978); *Estate of Park v. Commissioner*, 475 F.2d 673 (6th Cir. 1973).

nations require familiarity with local practice, local attorneys, and the history of particular estates — matters the IRS is ill-equipped to evaluate. Taxpayers will be prejudiced by inconsistent results.

The Second Circuit's reliance on *Commissioner v. Estate of Bosch*[3] for its construction of section 2053 was misplaced. I.R.C. Section 2056, which this Court interpreted in *Bosch*, has materially different language and altogether different legislative history from section 2053.

Moreover, in the *Erie* tradition, *Bosch* was principally concerned with the manner in which federal courts and agencies ascertain state *law* and the deference that must be given to interpretations of state *law* by state courts at different levels. The present case does not have to do with choice-of-law issues, since controlling state law on estate attorneys' fees is well-settled, but instead with the degree of deference owed to factual and discretionary determinations by trial-level state courts. The determination of the Surrogate's Court in this case should be respected by federal authorities, since it is the best evidence of how state law should be applied to particular facts and circumstances. The government's contention, drawn from *Bosch*, that the only factual determinations federal authorities are required to respect are those of a state's highest court, is unworkable and meaningless in the context of a discretionary fee allowance.

The result reached by the court below amounts to a judicial blessing upon an unwarranted intrusion by the federal government into the administration of decedents' estates, historically the province of the states and their specialized courts. Collateral review for tax purposes of attorneys' fee orders reflects negatively on the ability or willingness of state probate judges to exercise their discretion conscientiously and competently. Collateral

[3] 387 U.S. 456, 18 L. Ed. 2d 886 (1967).

review promises, furthermore, to spawn a new species of unnecessary litigation in the federal courts over an issue controlled by state law.

Because the IRS should permit a deduction for the fee amount approved by the Surrogate's Court, it had no authority to apply its own discretion to the issue of a proper fee. Accordingly, the IRS did not have a proper purpose for its summonses, and the district court properly denied enforcement.

ARGUMENT

POINT I

WHITE SOUGHT TO MEET HIS BURDEN BY SHOWING THE ACTUAL PURPOSE OF THE IRS SUMMONSES AND THAT IT WAS IMPROPER

The government opposed the petition for certiorari in this case by arguing that the key underlying substantive issue — whether the IRS is free under I.R.C. § 2053 to second-guess the Surrogate's Court's fee allowance — could be avoided. The government argued that the threshold for summons enforcement was so low that White should be compelled to comply regardless of how the IRS actually intended to use the subpoenaed material.

Summons enforcement standards are admittedly low. But the rulings of this Court have not implied that there are no standards at all. White was entitled to take up the burden of demonstrating that the IRS had only one purpose for issuing its summonses and that its purpose was improper. White showed the district court the IRS purpose. The issue of whether that purpose was proper was presented to both courts below, was addressed and resolved by them, and is squarely framed for decision by this Court.

A. *An IRS investigation must be based on a proper purpose*

The summons power of the Internal Revenue Service is governed by statute (I.R.C. § 7602), as interpreted by this Court in *United States v. Powell*, 379 U.S. 48, 13 L. Ed. 2d 112 (1964). Section 7602 authorizes the IRS "to examine any books, papers, records, or other data which may be relevant or material" to an investigation whose purpose is to ascertain "the correctness of any return." The district courts are empowered to enforce an IRS summons if (1) there is a legitimate purpose for the investigation, (2) the materials sought are relevant to the purpose of the investigation, and (3) the materials sought are not already in the possession of the IRS. *United States v. Powell*, 379 U.S. 48, 57-58, 13 L. Ed. 2d 112, 119 (1964). *Accord, United States v. LaSalle National Bank*, 437 U.S. 298, 317-18, 57 L. Ed. 2d 221, 236 (1978).

This Court held in *Powell* that the IRS could make a prima facie case for enforcement of a subpoena by alleging compliance with these standards. 379 U.S. at 58, 13 L. Ed. 2d at 119-20. While the burden then shifts to the taxpayer to challenge these showings, *id.*, a summons enforcement action is not a rubber-stamp proceeding. If a taxpayer can demonstrate that a summons has not been issued for a proper purpose, enforcement should be denied. *Id.*[4] The district courts have a duty to see that "a legitimate investigation" is being conducted and that the summons is "no broader than necessary to achieve its purpose." *United States v. Bisceglia*, 420 U.S. 141, 151, 43 L. Ed. 2d 88, 96 (1975).

[4] The Court in *Powell* sharpened the definition of "proper purpose" by stating that "a court may not permit its process to be abused." *Id.* By stressing that a good-faith standard applies and that an improper purpose would be "to harass the taxpayer or to put pressure on him to settle a collateral dispute," *id.*, the Court made it clear that an adversary hearing on entitlement to summons enforcement is not the "meaningless" *(id.)* inquiry the government seems to favor.

B. *The conclusory allegations in this proceeding were insufficient to support enforcement of the summonses*

The IRS petition that began this proceeding failed to identify the purpose of its investigation or the relevance of the materials it sought. In other summons enforcement disputes that this Court has had occasion to review, the IRS has invariably alleged the *specific* object of its audit. In *Powell*, for example, the IRS agent alleged that he suspected understated income and overstated expenses. 379 U.S. 58, 50, 13 L. Ed. 2d 112, 115 (1965). In *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 83 L. Ed. 2d 678 (1985), the IRS specified that it was investigating possible underreported income and questionable business deductions. *Id.* at 312-13, 13 L. Ed. 2d at 682-83.

The petition filed in this proceeding, however, was highly unspecific. It alleged only that "[t]he testimony and other data demanded by the summonses relate to the liability under examination, and might shed light on the correctness of the federal tax liability of the Estate of Helen B. Smith, deceased." J.A. A-3. A supplemental affidavit from IRS attorney Serling supplied no further particulars, only an assurance that "[t]he testimony and the books, records, papers, and other data demanded by the summonses issued to and served upon James M. White are necessary for the correct determination of the federal estate tax liability of the Estate of Helen B. Smith, deceased." J.A. 11.

If conclusory language like this were sufficient, the same form could be used to draft every IRS enforcement petition. What, besides tax liability, *would* concern the IRS? By presenting its "purpose" at such a superficial level, the government was, in essence, asking the district court to take it on faith that its objectives were proper. Far from meeting the *Powell* requirement that the IRS "show" a proper purpose for its summonses, the government "showing" in this case merely parroted the *Powell* rubric.

The petition could thus have been denied on the ground that the government's conclusory allegations failed to make out a prima facie case for enforcement. In that case, the burden of showing an improper purpose would not have shifted to White.

C. *In any case, White met any burden he might have had by showing that the actual purpose of the summonses, which has never been in dispute, was to make a collateral review of the reasonable value of his services as an attorney*

Notwithstanding the inadequacy of the government's initial "showing", the actual, specific purpose of the investigation was identified in attorney White's responding papers. In the lower courts that purpose was not in dispute, and the government defended it candidly and vigorously. Thus, even if the burden of showing abuse of the court's process — an "improper purpose" — had shifted to him, White met his burden under *Powell*.

The sole focus of the IRS summonses was on the services White rendered to earn the attorney's fee that had been ordered by the Monroe County Surrogate and taken as a deduction on the Smith estate tax return. The IRS wanted White's records to facilitate a collateral review of the time expended by attorney White so that it could then judge for itself whether the Surrogate's determination was fully justified, and its representative said so in a letter to White even before the summonses were served. J.A. 32. The IRS intended to allow a deduction of the Smith estate tax return for only so much of the amount as it considered reasonable.

In White's view, that purpose was improper. There were any number of legitimate reasons why the IRS *could* have sought to review the attorney's fee. But none of these was claimed. The IRS was not trying to ascertain whether the fee was actually paid. Nor was it seeking to verify that the specific amount paid was actually

approved by the Surrogate. Nor, critically, was the IRS seeking to ensure that the Surrogate's fee award was not procured by fraud, bribery, or other irregularity;[5] at oral argument before the district judge, the government disclaimed any such concern. Transcript of Proceedings Before Hon. Michael A. Telesca, Sept. 24, 1986, p. 21. For *any* of these purposes, White *would have been willing to respond to an IRS summons* and to open his files, and he made that willingness clear to the IRS and to the district court.

The Court of Appeals faulted the district judge (J.A. 81) for requiring that the IRS make a prima facie showing of fraud or overreaching as a prerequisite to summons enforcement (J.A. 60-61). Indeed, the district court did not need to go as far as it did, given the government's posture. The government has always been candid in stating, as it already has said in this Court, that it believes that the IRS is entitled to make an "independent assessment of whether the fees approved by the Surrogate were in fact 'just and reasonable.' " Brief In Opposition to Petition for Certiorari, p. 8.

The matter before the Court is not, therefore, a routine summons enforcement matter. White met his burden under *Powell* by demonstrating that the *sole* purpose of the summonses was to

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[5] As District Judge Telesca pointed out (J.A. 60), New York law permits the order of a Surrogate's Court to be attacked on grounds of fraud, newly discovered evidence, or clerical error. The district judge cited N.Y. Sur. Ct. Proc. Act § 209; *Estate of Chodikoff*, 54 Misc. 2d 785, 786, 283 N.Y.S.2d 555, 557 (Sur. Ct. Rensselaer Co. 1967); and *Estate of Heller*, 33 Misc. 2d 798, 226 N.Y.S.2d 260 (Sur. Ct. N.Y. Co. 1962). Similar grounds, Judge Telesca implied, would justify IRS refusal to give preclusive effect to a discretionary fee allowance.

Thus, a taxpayer whose deduction is disallowed by the IRS for fraud would then be able to seek modification of the probate decree and thus bring the allowance into harmony with the deduction. By contrast, if the IRS merely second-guesses a Surrogate's Court's discretionary allowance, a taxpayer has no right to ask the Surrogate's Court to reconsider. The inconsistency would be irremediable.

enable the IRS to make its own evaluation of the reasonableness of his estate attorney's fee and to allow or disallow the estate's deduction of that fee accordingly. Consequently, certiorari was properly granted, and the narrow issue that controls the enforcement of the summonses is whether that purpose is, as White contends, improper.

POINT II

I.R.C. § 2053(a) DIRECTS THE IRS TO ACCEPT DEDUCTIONS FOR ATTORNEYS' FEES THAT HAVE BEEN ALLOWED BY THE SURROGATE'S COURT

The IRS purpose of inquiring into the reasonableness of White's attorney's fee was improper because the Internal Revenue Code provides that an attorney's fee ordered by a local probate court, like any administration expense, is deductible, whether the IRS considers the fee reasonable or not. Section 2053(a) of the Code provides that "such amounts . . . for administration expenses . . . as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered" are to be deducted in determining the value of the taxable estate.

The government has argued in this proceeding that the word "allowable" must be interpreted to mean "allowable under state law as interpreted and applied by the IRS." In the government's view, an expense is not necessarily "allowable" merely because it has actually been "allowed" by a state probate court as a charge against the estate. Thus, according to the government, in auditing administration expenses the IRS need not assume that a state court either interpreted or applied state law correctly; it should consider *de novo* whether state law permits an expense to be charged against an estate and whether the full amount of the expense is justified.

A. *Section 2053(a) should be construed consistently with the historical reluctance of Congress and this Court to permit federal courts and agencies to pass on matters of decedents' estates*

The history of this statute and the policies that underlie it require that the word "allowable" be construed to encompass the word "allowed", so that an administration expense actually allowed by a local probate court is necessarily allowable as an estate tax deduction. First, as this Court has long recognized, Congress has consistently regarded matters of inheritance, decedents' estates, and probate as primarily, if not exclusively, matters of concern to the states rather than the federal government. While the federal estate tax is an excise tax on the privilege of passing property at death, the exercise of that privilege is exclusively within the regulatory authority of the several states. *New York Trust Co. v. Eisner*, 256 U.S. 345, 65 L. Ed. 963 (1921); *Knowlton v. Moore*, 178 U.S. 41, 44 L. Ed. 969 (1900).

Federal courts are so reluctant to pass on probate matters that they will not even accept diversity jurisdiction over issues involving decedents' estates. *Byers v. McAuley*, 149 U.S. 608, 37 L. Ed. 867 (1893); *see Giardina v. Fontana*, 733 F.2d 1047, 1052 (2d Cir. 1984). Congressional unwillingness to involve federal courts and agencies in probate matters arises in part from a sense of comity and federalism, *see Younger v. Harris*, 401 U.S. 37, 44-45, 27 L. Ed. 2d 669 (1971), that recognizes that the federal treasury and state probate courts have discrete interests and their own spheres of authority.

It follows, therefore, that in enacting section 2053(a) Congress sought to relieve federal authorities from any need to pass on issues of state law. Several compelling reasons support this reading of the congressional intent:

1. *The prerogatives sought by the government will result in unnecessary duplication of local determinations and local expertise*

First, and obviously, federal resources would be wasted if the IRS duplicated the same determinations that state probate courts are already making and the expertise in state law required to make them. Doing the job right would require the IRS to become knowledgeable not only about the laws of 50 states, but also, from time to time, about the laws of decedents' estates in scores of other jurisdictions around the world. (Section 2053(a) refers to the jurisdictions "within or *without* the United States, under which the estate is being administered" (emphasis supplied)). Indeed, in jurisdictions like New York where fee allowances legitimately vary from community to community,[6] the IRS would need to familiarize itself with unique aspects of local practice in dozens of counties.

No federal interest requires the IRS to familiarize itself with estate administration practices all over the nation and the world. If Congress felt that local notions of what should be allowed for estate administration were not to be trusted, it surely would have prescribed uniform federal limits on deductibility — a far more sensible approach than requiring the IRS to become so conversant with estate administration rules around the world that it could apply them more effectively than the natives.

[6] Under *Estate of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974), a surrogate judge setting attorneys' fees is required to consider, among other things, customary fees charged by other members of the bar. *See Estate of Dowd*, 74 A.D.2d 570, 424 N.Y.S.2d 293 (2d Dep't 1980); *Estate of Shalman*, 68 A.D.2d 940, 414 N.Y.S.2d 70 (3d Dep't), *appeal dismissed*, 48 N.Y.2d 753, 422 N.Y.S.2d 1028 (1979). Obviously, what is customary in Manhattan will vary sharply from what is customary in rural counties, if only because of the cost-of-living differential.

2. *The prerogatives sought by the government tend impermissibly toward a federal law of decedents' estates*

Second, as a practical matter, the formidable task of acquiring expertise in so many jurisdictions would irresistibly tempt the IRS to substitute its own uniform standard. And so it has; this very case shows how little stomach the IRS has for local prerogatives and how much it prefers a uniform yardstick of its own devising. The IRS evidently prefers a timesheet-and-hourly-rate approach to attorneys' fees merely because it is mechanical and can be uniformly applied without the tiresome necessity of referring to more subjective criteria prescribed under local law.[7] If the IRS is permitted to disregard local awards of estate attorneys' fees at will, the practical result will be the establishment of a *de facto* federal rule of attorneys' fees.

There is no presumption in favor of uniformity from state to state. As this Court has noted, the custom of resorting to the laws and decisions of the states is too well-established and diversified to say that uniformity is the desideratum. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 88 L. Ed. 635, 643 (1944); *Poe v. Sanborn*, 282 U.S. 101, 117-18, 75 L. Ed. 239, 247 (1930). The patent intent of Congress was that deductions for estate administration should be allowed if state courts have allowed them, so as to simplify the task of ascertaining federal estate tax and to provide a consistent, predictable result for taxpayers. What the IRS is asking this Court to sanction in this proceeding would grandly complicate and prolong that task.

[7] Under New York decisions, by contrast, undue emphasis on a time-clock approach to setting a reasonable attorney's fee can be an abuse of discretion. *Estate of Shalman*, 68 A.D.2d 940, 414 N.Y.S.2d 70 (3d Dep't 1979); *Estate of Brehm*, 37 A.D.2d 95, 97, 322 N.Y.S.2d 287, 290 (4th Dep't 1971).

3. ***Congress surely intended to preclude, not create, any threat that different fee amounts would be allowed for state and federal purposes***

Third, an undesirable side effect of the "second-guessing" privilege sought by the IRS is the prejudice to taxpayers who are caught between the compulsion to honor the decrees of probate courts and the caprice of a tax auditor. If the IRS disallows part of a deduction for attorneys' fees on the ground that the fee ordered by a probate court is unreasonably large, the taxpayer will still have an obligation to obey the decree. The lawyer will be paid, but the taxpayer (ultimately, that is, the estate beneficiaries) will bear the cost of the IRS "second-guess".

This result will be doubly frustrating to taxpayers because they will not be able to avoid it. Unless the IRS publishes guidelines indicating precisely how much of a deduction for attorneys' fees it will permit under given circumstances, no taxpayer will know how much of a deduction he can safely take. The executor preparing the return will be unable to predict how much of a fee the IRS will consider justifiable. The predictability that follows when an executor can confidently report on a tax return an expense for an amount approved by a probate court — which Congress surely intended — will be lost. The taxpayer might as well pick a figure at random.

By incorporating state law in section 2053(a), Congress clearly sought to preclude a threat of inconsistent determinations by state and federal authorities.

> Not giving effect to a state court determination may be unfair to the taxpayer and is contrary to the congressional purpose of making federal tax consequences depend upon rights under state law. The result will be to tax the taxpayer or his estate for benefits which he does not have under state law.

Commissioner v. Estate of Bosch, 387 U.S. 456, 470, 18 L. Ed. 2d 886, 896 (1967) (Douglas, J., dissenting).[8] In this case, the government urges a principle that would make inconsistent results commonplace.

4. ***Federal agencies and courts lack the perspective that is absolutely indispensable for proper application of state law — perspective that local probate courts uniquely boast***

Fourth, with all due respect to the diligence and perspicacity of the Internal Revenue Service, it cannot fairly be maintained that the IRS has the practical ability and competence to evaluate reasonable estate attorneys' fees under state law. The futility of a federal agency's attempting to do so is particularly acute in New York, where attorneys' fees can neither lawfully nor practicably be set by any court but the Surrogate's Court. Contrary to the practice in some other states, New York estate attorneys are not entitled by law to a fee that can be determined mechanically by an arithmetical formula. The allowance of a fee to an estate attorney is, under New York law, solely within the authority and discretion of the Surrogate's Court. N.Y. Constitution art. 6, § 12(d); N.Y. Sur. Ct. Proc. Act § 201(3).

In exercising his discretion, a surrogate judge must consider and balance a number of factors. *See Estate of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974). But several of the factors enumerated by the Court of Appeals in *Freeman* are intangible

[8] Justice Harlan similarly decried "the incongruity that stems from dissimilar treatment by state and federal courts of the same or similar factual situations." *Id.* at 476, 18 L. Ed. 2d at 901 (Harlan, J., dissenting). While for the reasons stated in Point III, below, *Bosch* is inapplicable to I.R.C. § 2053, the dissenters' concerns for fairness do apply.

and unquantifiable.[9] It follows that, for any given estate, there is never one and only one figure that represents the "correct" attorney's fee. "There is no hard and fast rule by which it can be determined what is reasonable compensation for an attorney in any given case." *Estate of Brehm*, 37 A.D.2d 95, 97, 322 N.Y.S.2d 287, 289 (4th Dep't 1971). *Accord, Estate of Quade*, 121 A.D.2d 780, 782, 503 N.Y.S.2d 193, 195 (3d Dep't 1986).

New York law thus requires surrogate judges to draw upon their familiarity with particular estates and local estate practice generally in setting fees. Federal authorities lack this familiarity and cannot replicate it. For example, under *Freeman* a reasonable attorney's fee depends in part on the difficulty of the questions involved in the estate and the skill required to handle them. 34 N.Y.2d at 9, 355 N.Y.S.2d at 341. A probate judge knows the problems of individual estates because he has overseen them. Often he will have been called on to resolve particular issues. But a government tax attorney or a federal court is unlikely to appreciate the ease or complexity of estate administration matters without lengthy explanations. Authorizing tax auditors or federal judges — or, as the IRS would have it, federal juries[10] — to

[9] The Court of Appeals stated that the factors relevant to a fee award include (1) time and labor required, (2) difficulty of the question presented and the skill required to handle the problems presented, (3) the lawyer's experience, ability, and reputation, (4) the amount involved, (5) the benefit to the client from the services, (6) community custom and practice regarding estate attorneys' fees, (6) the contingency or certainty of compensation, (7) results obtained, and (8) responsibility assumed. 34 N.Y.2d at 6, 9-10, 355 N.Y.S.2d at 341.

[10] In the present matter, petitioner White paid the deficiency assessed against the Smith estate when the Service arbitrarily disallowed the entire attorney's fee awarded by the Surrogate. He was then required to sue for a refund in a collateral proceeding in the Western District of New York. After the Second Circuit rendered its decision in this case, the Service filed a demand for a *jury* trial in the refund action! The principal amount in issue is less than $6,000. J.A. 22.

assess the complexity of a given estate is like letting an umpire call balls and strikes from left field. Federal authorities lack the necessary perspective.

Similarly, under *Freeman* the experience, ability, and reputation of the attorney handling the estate, together with the customary fees charged by the Bar for similar services, must be considered. 34 N.Y.2d at 9, 355 N.Y.S.2d at 341. Local probate judges know the local estate bar, and they can draw on personal observations of the lawyer who handles an estate. Federal tax auditors and federal judges, on the other hand, are typically unfamiliar with the ability and standing of local estate lawyers and customary fees in the community. Without expert assistance, federal authorities are simply unable to weigh these factors into the "equation".

Again, under *Freeman* a New York Surrogate Judge is required to consider how much an estate has benefited from the services of its lawyer. *Id.* Federal authorities would have to review virtually the entire administration of an estate — including aspects in which they have no expertise — to determine how a lawyer's work benefited his client. But a local probate judge knows first-hand what a lawyer has done for his estate client.

In New York, therefore, a local probate judge sits in the *only* vantage seat from which a reasonable attorney's fee can be evaluated. IRS auditors and federal judges, or juries, are especially ill-situated to pass upon attorneys' fees for estate administration.

The futility of expecting federal authorities to assess the *Freeman* factors with anything approaching the competence of the Surrogate's Court was lost on the court below. Ironically, however, shortly after it ruled for the IRS in the present case, the Second Circuit Court of Appeals expressly acknowledged the principle that it disregarded in the present case. In *Cluett, Peabody & Co. v. CPC Acquisition Co.*, 863 F.2d 251 (2d Cir. 1988),

the court ruled that a district court may assume ancillary jurisdiction of a dispute over attorneys' fees that would otherwise belong in state court, merely because the fees were earned in the defense of a lawsuit in the district court. The court noted that

> familiarity with the amount and quality of work performed by [the attorneys] would enormously facilitate rapid disposition of a fee dispute, while a great deal of the record would have to be considered anew and relitigated in a state court unfamiliar with the proceedings. Second, a court has a responsibility to protect its own officers in such matters as fee disputes.

Id. at 256. The court concluded that it would be "wasteful and duplicative" to require a state court to review an attorney's fee that had been earned in federal district court.[11] *Id.* at 257.[12]

Knowing that in many states an attorney's fee is set by the local probate judge who has overseen the very matter on which the fee was earned, Congress could not have intended that the reasonable value of his services be reviewed by any other court or agency.

[11] The conclusion in *Cluett, Peabody* that the court properly entertained the case is particularly striking if one considers that the case was, after all, a garden-variety contract claim for services. In recent years, the overburdened federal courts have uniformly regarded dubious claims on their jurisdiction with hostility.

[12] The result reached in *Cluett, Peabody* is generally accepted in other circuits as well. *E.g., Novinger v. E.I. DuPont de Nemours & Co.*, 809 F.2d 212, 217-18 (3d Cir.), *cert. denied*, 481 U.S. 1069, 95 L. Ed. 2d 871 (1987); *Moore v. Telfon Communications Corp.*, 589 F.2d 959 (9th Cir. 1978); *American Fed'n of Tobacco-Growers, Inc. v. Allen*, 186 F.2d 590, 592 (4th Cir. 1951).

B. *The statutory reference to amounts "allowable" under state law entitles estates to deduct amounts actually allowed by state probate courts*

The Second Circuit held that the reference in section 2053(a) to the laws of the states and other countries merely directs the IRS to interpret and apply local law, giving no more than "proper regard" to the way probate courts have already performed that task. J.A. 77. In that court's view, the statute did not provide sufficiently unambiguous direction to give preclusive effect to state court decrees allowing administration expenses. The government has similarly argued that because the statute employs the term "allowable" instead of "allowed", the IRS is free to decide for itself what is "allowable" under state law, instead of referring to what a probate court has actually "allowed".

In historical context, however, "allowable" expenses under the statute *necessarily* include expenses actually allowed. The original version of section 2053 actually used the word "allowed". Taxpayers were permitted to deduct "[s]uch amounts for . . . administration expenses . . . as are allowed by the laws of the jurisdiction . . . under which the estate is being administered." Act of 1916, § 203(a)(1).

The word "allowed", which survived several revisions of the statute, left little doubt that amounts actually approved by a local court were deductible. The word "allowed" was part of the statute, for example, when the Sixth Circuit Court of Appeals held in *Goodwin's Estate v. Commissioner*, 201 F.2d 576 (6th Cir. 1953), that where a probate court made an order allowing claims for loans to the decedent, to which parties with an adverse interest had an opportunity to object, the amounts were necessarily

deductible as administration expenses, even though they were uncontested. *Id.* at 580.[13]

When the Internal Revenue Code of 1954 was enacted, the word "allowable" was substituted. This was not a congressional indication that *less* deference should be given to allowances of local courts. On the contrary, the House Report on the new tax code, commenting on the items made deductible under section 2053, suggests that *no change in the law at all* was intended:

> These items are allowable as deductions under existing law under section 812(b) of the 1939 Code and *all the rules applicable to such items under the existing provision of law are adopted in this section.*

H.R. Rep. No. 1337, 83rd Cong., 2d Sess., *reprinted in* 1954 U.S. Code Cong. & Ad. News 4025, 4460. The same assurance that no change in the law was intended appears in the Senate Report. *Id.* at 5117-18.

The textual change from "allowed" to "allowable" is not discussed in the congressional reports. But the change was not one of substance;[14] it merely recognized the evolving state of probate law in the various states. By 1954, many states had eliminated formal probate proceedings for many estates. As a result, executors in many jurisdictions were entitled to pay claims against

[13] The court held: "The Tax Court has no authority to set aside the judicial finding as to adequacy of consideration and to find that the money loaned the father did not belong to the daughters. In Guaranty Trust Co. v. Commissioner, 2 Cir., 98 F.2d 62, relied on by respondent as supporting the existence of such authority, no question of the effect of a valid state court decision was involved." *Id.* at 582. *See also, First Mechanics Nat. Bank of Trenton v. Commissioner*, 117 F.2d 127 (3d Cir. 1940).

[14] Indeed, one court interpreted the former statute, containing the word "allowed", to mean that administration expenses "must be such as are *allowable*" under the law of the jurisdiction under which the estate is being administered. *Schmalstig v. Conner*, 46 F. Supp. 531, 533 (S.D. Ohio 1942). The words are virtually interchangeable.

estates, including executors' fees and attorneys' fees, without obtaining a court order. *See Pitner v. United States*, 388 F.2d 651, 655 (5th Cir. 1967). By authorizing deductions that are "allowable" under state law, whether or not "allowed" by court order, Congress merely codified what the courts had already recognized: that a court order was not a prerequisite for a deduction. *See Commissioner v. Bronson*, 32 F.2d 112, 114 (8th Cir. 1929). This did not imply that court-ordered administration expenses were no longer deductible as a matter of course.

Under the Internal Revenue Code of 1954, therefore, courts continued to hold that section 2053 requires that the IRS give effect to state court allowances of administration expenses. The Second Circuit, for example, held in *Dulles v. Johnson*, 273 F.2d 362 (2d Cir. 1959), *cert. denied*, 364 U.S. 834, 5 L. Ed. 2d 60 (1960), that because amounts for attorneys' fees had been allowed by the Surrogate's Court and paid out of the funds of the estate, it was "impossible to reach any other result than that they were administration expenses. As such they were deductible." *Id.* at 369-70. Similarly, the court in *Sussman v. United States*, 236 F. Supp. 507 (E.D.N.Y. 1962), noting that attorneys' fees are a "familiar" and "inevitable" expense, found that "in general what the administering court [the Surrogate] allows as administration expenses is deductible as such." Id. at 510.[15] In *Estate of Smith v. Commissioner*, 510 F.2d 479 (2d Cir.), *cert. denied*, 423 U.S. 827, 46 L. Ed. 2d 44 (1975), however, the Second Circuit reached a different conclusion regarding the deductibility of commissions for the sale of estate assets, despite Judge Mulligan's dissenting view that

> The Code unambiguously provides for their deduction if allowed by the jurisdiction administering the estate and neither the Commissioner of Internal Revenue nor the Tax

[15] Appearing to agree with this proposition, but with some ambivalence, are the decisions in *Cadden v. Welch*, 298 F.2d 343 (6th Cir. 1962), and *Schmalstig v. Conner*, 46 F. Supp. 531 (S.D. Ohio 1942).

> Court, in my view, can properly reverse the State Court determination. Congress has explicitly left the matter in the hands of the state.

510 F.2d at 483.

Other courts thought it obvious that "allowable" included "allowed", as Judge Mulligan did. The Sixth Circuit Court of Appeals in *Estate of Park v. Commissioner*, 475 F.2d 673 (6th Cir. 1973), found:

> By the literal language of § 2053(a), Congress has left the deductibility of administrative expenses to be governed by their chargeability against the assets of the estate under state law. As otherwise stated, Congress has committed to the considered judgment of the states whether a particular expense is allowable as a proper or necessary charge against estate assets. In the situation before us, the expenses were admittedly allowable under Michigan law. They were paid out of probate assets and they were approved in two different accountings filed with the probate court. Hence they are deductible under § 2053(a).

Id. at 676. The Seventh Circuit Court of Appeals has likewise held: "As a general rule the decree of a probate court approving expenditures as proper administrative expenses under state law will control." *Estate of Jenner v. Commissioner*, 577 F.2d 1100, 1106 (7th Cir. 1978).

C. *Summary*

The history of section 2053 indicates how it should be construed: "allowable" expenses necessarily include expenses that have formally been "allowed". Because the task of exercising discretion to set an attorney's fee requires a local perspective and specialized expertise in estate supervision, Congress could not have intended the IRS and the federal courts to attempt to per-

form it. Congress intended to avoid duplication of effort and inconsistent results by making deductibility turn on the result in state court.

POINT III

THE BOSCH DECISION IS NOT APPLICABLE TO I.R.C. § 2053, BUT IN ANY CASE IT SHOULD NOT BE CONSTRUED TO PERMIT COLLATERAL REVIEW OF DISCRETIONARY ALLOWANCES OF ADMINISTRATIVE EXPENSES BY STATE PROBATE COURTS WHERE THE STATE'S HIGHEST COURT HAS CLEARLY ESTABLISHED THE LEGAL STANDARDS

To a degree that must have been surprising even to the government, the Second Circuit Court of Appeals premised its decision below on this Court's much-discussed, controversial decision in *Commissioner v. Estate of Bosch*, 387 U.S. 456, 18 L. Ed. 2d 886 (1967). Contrary to the perception of the Court of Appeals, however, the statute in the present case (I.R.C. § 2053) is so dissimilar to the statute in *Bosch* (I.R.C. § 2056) that *Bosch* affords no assistance to the statutory construction problem posed here.[16] The Court of Appeals failed to see that the key elements of the

[16] A recent, comprehensive article by Professor Gilbert P. Verbit of Boston University School of Law discusses the confusion that has followed in the wake of the 5-4 decision in *Bosch*. Verbit, G. P., *State Court Decisions in Federal Transfer Tax Litigation: Bosch Revisited*, 23 Real Prop., Prob. & Tr. J. 407 (Fall 1988). Professor Verbit noted in his article that the teachings of *Bosch* almost instantly put the federal courts into disarray. Moreover, the case is "cited more often in situations in which it is inapposite, than when . . . it applies." *Id.* at 446. So it was by the court below.

The humdrum, oft-recurring issue of deductibility of estate administration expenses involved in this case calls for a simple rule with ease of resolution and predictability. Engrafting the intricacies of *Bosch* onto section 2053, however, could aggravate existing conflict and confusion over the preclusive effect of state probate court decrees, rather than alleviating it.

Bosch ruling are not present in this case. Moreover, that court misconceived the thrust of this Court's decision in *Bosch*.

The decision in *Bosch* resolved two appeals that arose after taxpayers sought and obtained rulings from state probate courts regarding the effect of trust provisions in wills. Armed with favorable decisions that interpreted state law in such a way that trust assets qualified for the marital deduction under section 2056(b)(5) of the Internal Revenue Code, the taxpayers attempted to deduct the corpus of the trusts from the gross estates.

The issue on audit, therefore, was whether these trial-level decisions on issues of law should be given conclusive effect for purposes of the marital deduction. This Court agreed with the Service that while rulings from the states' highest courts must necessarily be respected, these non-adversarial rulings from a trial-level court were not dispositive for federal estate tax purposes. *Id.* at 464-65, 18 L. Ed. 2d at 893-94.

A. *The language and history of the marital deduction statute construed in Bosch are materially different from section 2053*

The Second Circuit's reliance on *Bosch* rested in good part (see J.A. 76) on the erroneous premise that the marital deduction statute (I.R.C. § 2056(b)(5)) is comparable to section 2053. The contrasts begin with the legislative history of section 2056. This Court found in *Bosch* that, for purposes of the marital deduction, Congress intended only "proper regard", not finality, to be given to interpretations of wills in state court proceedings, even where those proceedings were adversarial. 387 U.S. at 463-64, 18 L. Ed. 2d at 893; *see Estate of Smith v. Commissioner*, 510 F.2d 479 n.1 (2d Cir.), *cert. denied*, 423 U.S. 827, 46 L. Ed. 2d 44

(1975) (Mulligan, J., dissenting).[17] The Court also noted that the overall framework of section 2056 showed that Congress intended the marital deduction to be "strictly construed and applied." *Id.* at 464, 18 L. Ed. 2d at 893. While the legislative history of section 2056 expressly indicates that state court determinations need be given only "proper regard", the legislative history of section 2053 shows that Congress has always intended taxpayers to be able to deduct expenses that have actually been "allowed". See pp. 25-27 above.

Sections 2053 and 2056 have different language as well as different legislative history. Section 2056 contains no explicit reference to state law, as section 2053 does. The congressional preference for strict construction and application of the marital deduction which this Court perceived in *Bosch* is not evident in section 2053.

B. *Bosch was a choice-of-law decision that should not be construed to apply to state court determinations on issues of fact and discretion*

The lower court's preoccupation with *Bosch* was also misplaced because that case dealt with issues of state law, not issues of fact or discretion. The New York and Connecticut courts had not, for example, made factual determinations as to what the testator meant, or discretionary decisions as to how much could be charged against the estate. Instead, the state trial courts had ruled on purely legal matters. Was a document purporting to release a general power of appointment valid under New York law?

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[17] As Judge Mulligan pointed out:

> There was no act of Congress there [in *Bosch*, construing I.R.C. § 2056(b)(5)] ceding jurisdiction to the state [as in I.R.C. 2053] but only the report of a Senate Committee recommending that "proper regard", not finality, should be given to the interpretation of a will by state courts.

Id. at 484 n.1.

Should federal estate taxes be prorated under Connecticut law notwithstanding a testamentary directive to the contrary? Neither lower court decision on these points of law was appealed.

This Court analyzed the problem as a choice-of-law question. Consistently with the Rules of Decision Act (28 U.S.C. § 1652) and *Erie R. R. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188 (1938), the underlying issues were controlled by state law. But state law on the subject was not settled. Neither point of law had previously been addressed by the highest courts of New York and Connecticut. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457-61, 18 L. Ed. 2d 886, 889-92 (1967).

Since the rule of law was in doubt, the goal of federal authorities was to ascertain, by reference to lower court authorities or other persuasive data, what the highest court in the state would decide the rule of law to be. *Id.* The IRS was not bound, however, by the state court rulings obtained by the taxpayers, since, under a corollary of the *Erie* doctrine, "the decision of a state trial court as to an underlying issue *of state law* should a fortiori not be controlling." 387 U.S. at 465, 18 L. Ed. 2d at 893 (emphasis supplied). As the court held:

> This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. *If there be no decision* by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

Id. at 465, 18 L. Ed. 2d at 894 (emphasis supplied).

Bosch thus involved a search for the applicable rule of law.[18] The present case does not. It is true that the Surrogate's determination required the application of a rule of law to particular facts and circumstances. "[T]he underlying substantive rule", *id.*, however, has never been in doubt. In *Estate of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974), the New York Court of Appeals, which this Court in *Bosch* pronounced "the best authority on its own law", stated the principles governing estate attorneys' fees clearly, comprehensively, and definitively.[19] The Surrogate merely applied the well-established *Freeman* criteria.

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[18] Significantly, Justice Harlan did *not* see the case as presenting a choice-of-law issue. In his view,

> The question here is, however, not how state law must in the context of federal taxation ordinarily be determined; it is instead the more narrow one of whether and under what conditions a lower state court adjudication of a taxpayer's property rights is conclusive when subsequently the federal tax consequences of those rights are at issue in a federal court.

Commissioner v. Estate of Bosch, 387 U.S. 456, 457-61, 18 L. Ed. 2d 886, 889-92 (1967) (Harlan, J., dissenting).

The majority, however, treated *Bosch* as a choice-of-law case because the trial-level decisions were purely declaratory of the law. Setting aside the fact that the trial-level decisions fixed the rights of the estates and beneficiaries conclusively as among themselves, the majority treated the trial-level decisions as if they were no more than precedents interpreting state law that involved other taxpayers.

The present case resembles *Bosch* in that, as Justice Harlan stated, the probate court decree allowing White's fee constituted an "adjudication of a taxpayer's property rights." The distinction between *Bosch* and the present case is that the decisions in *Bosch* involved determinations made solely as a matter of law, while the determination of the Surrogate's Court in this case required no construction of law, but merely the application of discretion to a factual record.

[19] The *Freeman* decision is regularly cited and relied on by New York courts, *see, e.g.*, *Estate of Dowd*, 74 A.D.2d 570, 74 A.D.2d 570, 424 N.Y.S.2d 293 (2d Dep't 1980); *Estate of Shalman*, 68 A.D.2d 940, 414 N.Y.S.2d 70 (3d Dep't), *appeal dismissed*, 48 N.Y.2d 753, 422 N.Y.S.2d 1028 (1979), and has never been questioned.

In the present case, therefore, the IRS is not seeking to ascertain whether the Surrogate's Court's *interpretation* of state law is correct, for no interpretation is necessary, but whether that court's fee allowance was a proper exercise of *discretion* on the record before it. *Bosch* did not involve such an issue and this Court did not address it.

For this reason the Second Circuit's reliance on *Bosch* missed the mark. The issue of whether the Surrogate's decision should be given preclusive effect should have been decided on the basis of the language, purpose, and history of I.R.C. Section 2053.[20]

[20] The Second Circuit also held that Treasury Regulation Section 20.2053-1(b)(2) "permits the IRS to make an independent assessment of the deductibility of White's fees under state law and to assess the acceptability of the Surrogate's decree for federal tax purposes." This regulation (quoted above at page 4) contains so many qualifications and conditions that it can fairly be said to support both White's and the government's positions.

On the one hand, favoring White, is the language in the regulation that indicates that a local court decree should be accepted by the IRS if the court passed on the facts on which deductibility depends, or if the decree was rendered by consent. Both circumstances are present in this case. On the other hand is the language relied on by the Second Circuit: "The decree will not be accepted if it is at variance with the law of the State." The lower court believed that this provision authorized the IRS to ascertain a reasonable attorneys' fee for itself. J.A. 80. But this begs the question, since, once again, the Surrogate's decree did not decide an issue of law, but one of fact and discretion.

In any event, if the regulations place a greater burden on deductibility than Congress intended in enacting section 2053, they are invalid. *See Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 135, 80 L. Ed. 523, 532 (1936). *Accord, Dixon v. United States*, 381 U.S. 68, 76-75, 14 L. Ed. 2d 223, 228 (1965). The only statutory limitation on the deductibility of estate administration expenses is that they be "allowable by the laws of the jurisdiction . . . under which the estate is being administered." I.R.C. § 2053(a). As interpreted by the government and the court below, however, the regulation illegally adds to the statute "something which is not there." *United States v. Calamaro*, 354 U.S. 351, 359, 1 L. Ed. 2d 1394, 1399-1400 (1957).

C. *The Bosch holding is not a meaningful or usable guide for federal agencies and courts with respect to issues of fact and discretion*

Should the *Bosch* holding be extended to encompass issues of fact and discretion? The government argues, and the Second Circuit held, that no Surrogate's Court fee allowance deserves respect from the IRS until and unless it has been affirmed by the New York Court of Appeals. But while federal authorities may look to the decisions of a state's highest court as the best evidence of state *law*, as *Erie* and *Bosch* require, it is neither reasonable nor possible for a federal court or agency to look to decisions of the New York Court of Appeals for guidance on issues of fact or discretion. On the contrary, state appellate courts look to *trial-level* courts for guidance on such matters. The IRS should do the same.

In the first place, state courts of last resort, like this Court, almost never review issues of fact and discretion, but confine themselves to issues of law. New York similarly accords a high degree of respect to factual determinations of a trial-level court. Mid-level appellate review is confined to an abuse-of-discretion standard. *E.g., Estate of Shalman*, 68 A.D.2d 940, 414 N.Y.S.2d 70 (3d Dep't 1979). Under New York law, it is "ultimately" the Surrogate's Court's responsibility to decide what constitutes reasonable compensation. *In re Von Hofe*, 535 N.Y.S.2d 391, 392 (2d Dep't 1988); *Estate of Schaich*, 55 A.D.2d 914, 914, 391 N.Y.S.2d 135, 136 (2d Dep't 1977). New York appellate courts will affirm a Surrogate's exercise of discretion even where the judge has not rendered a decision explaining his order. *In re Ury*, 108 A.D.2d 816, 816, 485 N.Y.S.2d 329, 330 (2d Dep't 1985).

Indeed, the degree of respect accorded by the New York Legislature to exercises of discretion by the Surrogate's Court on attorney's fees is *so great* that the Surrogate's discretionary fee

allowance can *never* be reviewed by the New York Court of Appeals. That court has no jurisdiction to review such an issue, because article 6, section 3 of the New York Constitution limits the jurisdiction of the New York Court of Appeals "to the review of questions of law," and the Court of Appeals has consistently stated that it will not review discretionary fee allowances. *Estate of Freeman*, 34 N.Y.2d 1, 10, 355 N.Y.S.2d 336, 341 (1974); *Estate of Aaron*, 30 N.Y.2d 718, 332 N.Y.S.2d 391 (1972). The lower court's ruling that nothing short of an affirmance of the Surrogate's exercise of discretion by the New York Court of Appeals need be respected by the IRS is thus fraught with perversity; it is impossible for such an affirmance to be obtained.[21] Adopting the government's reasoning would be tantamount to ruling that the IRS may second-guess fee allowances for every New York estate.

In the second place, however, the Second Circuit's construction of *Bosch* lost sight of the objective. When a federal agency or court must ascertain a state rule of law, the best way to do so is to examine a state statute or a decision of the state's highest court, if one exists. That has been the law since *Erie* was decided; cases since then, including *Bosch*, have addressed the more difficult task of ascertaining state law in the absence of authority from a state's highest court.

Contrary to the government's position, there is nothing magically indispensable about a decision from the New York Court of Appeals. Even where the task of a federal court is to ascertain the state rule of law, the absence of a definitive ruling from the state's highest court does not imply *carte blanche* for the federal court to do as it pleases. This Court stated in *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 85 L. Ed. 139 (1940), that

[21] No attorneys' fee case has reached the New York Court of Appeals since *Estate of Freeman*, 34 N.Y.2d 1, 10, 355 N.Y.S.2d 336, 341 (1974), which was principally a restraint-of-trade case.

> [t]here are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.

Id. at 236-37, 85 L. Ed. at 144. Thus, because it is the duty of the federal courts "to ascertain from all the available data what the state law is," federal courts may not disregard decisions of intermediate appellate state courts unless "convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.* at 237, 85 L. Ed. at 144. While this Court subsequently held in *King v. United Commercial Travelers*, 333 U.S. 153, 92 L. Ed. 608 (1948), that a federal court need not accept a trial-level determination as conclusive evidence of how the Supreme Court of South Carolina might rule on a point of law, the Court was nevertheless careful to say:

> Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. . . . [O]ther situations in other states may well call for a different result.

Id. at 162, 92 L. Ed. at 613.

Other situations do call for different results. Where the task is *not* to ascertain the rule of law, but to resolve a factual issue involving the exercise of discretion, the datum most indicative of how a state's highest court would rule is a determination from the court that examined the facts in the first instance. Thus, in applying I.R.C. § 2053, the task is to ascertain whether amounts deducted represent administration expenses that are allowable under state law. In New York, at least, the best way to do *that* is to look to a decision of a Surrogate's Court that has actually allowed administration expenses, if one exists. A probate court

decision is the best available authority on whether particular expenses are "allowable" under New York law because state law says so.[22] The New York Appellate Division will affirm a Surrogate's Court exercise of discretion unless that discretion has been abused; the New York Court of Appeals is not allowed to examine the matter at all.

The government's willingness to abide by an attorney's fee approved by the New York Court of Appeals is meaningless because jurisdictional restrictions prevent the Court of Appeals from ever considering such matters. On the other hand, if the government's objective under Section 2053 is truly to ascertain how the Court of Appeals would view a particular attorney's fee, the best point of reference is an order of a Surrogate's Court judge.

D. *No danger of forum-shopping justifies the government's refusal to acknowledge the Surrogate's Court's decree*

Justice Douglas, dissenting in ***Bosch***, noted that "[t]he idea that these state proceedings are not to be respected reflects the premise that such proceedings are brought solely to avoid federal taxes." 387 U.S. at 470, 18 L. Ed. 2d at 896. However, forum-shopping is not an issue with administration expenses like attorneys' fees. In ***Bosch*** it was obvious that the taxpayers had invoked the jurisdiction of the state courts for no other reason

[22] Indeed, it ill-behooved the Second Circuit to find that the probate court was *not* the court best able to ascertain a proper fee, when in *Cluett, Peabody & Co. v. CPC Acquisition Co.*, 863 F.2d 251 (2d Cir. 1988) (discussed above at page 24), the same court held that a district court should go so far as to assume ancillary jurisdiction over a fee dispute, where the district court was familiar with the attorneys' work, rather than have the matter decided by a state court with undisputed jurisdiction. *Id.* at 256-57. In terms of judicial economy, this was as correct a decision as leaving the matter of estate fees to the discretion of the probate court would be.

than to obtain a ruling that would aid them for tax purpose[23] — a relatively risk-free procedure, since the relief requested was unopposed.[24] In other cases federal courts have also expressed reluctance to give effect to state court determinations that were obtained solely for tax purposes.

Neither in this case nor in any other case, however, has a taxpayer obtained a Surrogate's Court decree allowing administration expenses for the purpose of affecting tax liability. The decree of the surrogate judge in this case is what it appears to be: a direction that estate funds be disbursed and an assurance to the executor that payment is proper. The executor sought a decree from the Surrogate's Court because no other court had the requisite jurisdiction.

In many cases, of course, as in the present case, probate court decrees are issued without opposition. The fact remains that those who consent to probate court decrees — principally estate beneficiaries — have every reason to object to the estate's paying too much for legal services, since they will indirectly bear the cost of attorneys' fees. Moreover, probate court judges have an independent duty, irrespective of objections from interested parties, to ensure that expenses approved are reasonable and to protect beneficiaries who may improvidently consent to fee requests. In any event, the uncontested nature of many probate court proceedings was surely known to Congress when it made state law allowances the test of deductibility.

[23] 387 U.S. at 463, 18 L. Ed. 2d at 893.

[24] *Id.* at 473-74, 18 L. Ed. 2d at 898.

POINT IV

THE GOVERNMENT'S POSITION LEADS TO UNSEEMLY CONFLICT BETWEEN THE FEDERAL COURTS AND STATE ADMINISTRATION OF DECEDENTS' ESTATES, VIOLATING PRINCIPLES OF FEDERALISM

Our federal system of government implies a division of responsibility for governmental functions between the states and the national government. Justice Black spoke of

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44, 27 L. Ed. 2d 669, 675 (1971). The administration of decedents' estates falls in the category of matters that are reserved to the states. State courts "have an especially strong interest and well-developed competence" to adjudicate probate matters, *Giardina v. Fontana*, 733 F.2d 1047 (2d Cir. 1984). As already noted,[25] federal courts have historically avoided opportunities to intrude on the state prerogative of adjudicating all probate matters.

In this case, however, the government is asking this Court to authorize an incursion by the IRS into state administration of decedents' estates in a manner that casts disrespect on state probate courts. The government's position implies that the IRS or a district court will be more objective and conscientious than the New York Surrogate's Court. What a Surrogate Judge determines may be good enough for state purposes, the government seems to be saying, but federal tax authorities have higher standards.

[25] See p. 17-18 above.

The present case affords a striking example of how little regard the government has for the Surrogate's Court. Under government pressure to justify his fee, White asked Surrogate Ciaccio to explain how the attorney's fee had been set. Almost surprisingly, the Surrogate obliged, stating not only that the original application had been considered under the Court's usual standards consistent with the *Freeman* criteria, but also that the Surrogate had reviewed the application *again* and believed that the original fee order was proper. J.A. 38-39.

Far from carrying any weight with the government, however, the Surrogate's information apparently stirred its contempt. On appeal, the government disrespectfully ridiculed the Surrogate's letter as a "self-serving, after-the-fact justification of his rubber-stamping White's fee request." Brief for Appellants in United States Second Circuit Court of Appeals, p. 29. If the government were truly trying to apply *Bosch* principles in this very different context, it would be seeking, consistent with that decision, to give "proper regard" to the Surrogate's order. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 464, 18 L. Ed. 2d 886, 893 (1967).[26] By belittling the Surrogate, the government gives his considered judgment "no regard".

[26] Even the "proper regard" test is inappropriate with respect to administration expenses ordered to be paid by a state probate court, however, because the very term "proper regard" comes out of a Senate Finance Committee report dealing with the marital deduction statute (I.R.C. § 2056) that was involved in *Bosch*. As discussed above in POINT III, the materially different language of section 2053 should be construed to require that *full regard* be given to orders of state probate courts directing the payment of administration expenses.

The government's antagonistic attitude toward the Surrogate does not demonstrate Justice Black's ideal of

> sensitivity to the legitimate interests of both State and National Governments, . . . in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44, 27 L. Ed. 2d 669, 676 (1971). This Court has previously rejected arguments based "on the assumption that state judges will not be faithful to their constitutional responsibilities." *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 611, 43 L. Ed. 2d 483, 496 (1975), and one of the implications of federalism is that the federal government will not undertake "duplicative legal proceedings" that can "be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." *Steffel v. Thompson*, 415 U.S. 452, 462, 39 L. Ed. 2d 505, 516 (1974). How much less, therefore, should the government be heard to cast aspersions on a state court's ability to apply its *own* law?

"[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 79 L. Ed. 2d 67, 82 (1984). The problem of "'friction between state and federal courts'" is particularly acute when, as here, a party is threatened with prejudice from potentially conflicting findings. *De Cisneros v. Younger*, slip op., p. 2509 (2d Cir., decided March 30, 1989).

The end of the tension between the Surrogate's Court and the IRS is not in sight. As noted above, White has filed an action in the district court for a refund of the tax resulting from the disallowance of his fee, and in that action the government has filed a

demand for a *jury* trial. Presumably White will have the burden of showing the elements of *Freeman* with respect to his fee and persuading the jury that a reasonable fee for his services was as great or greater[27] than the fee ordered by Surrogate Ciaccio.

What will be tried before this jury — and in the other refund actions that executors are sure to institute now that the Second Circuit has given its blessing to collateral review of fee awards by federal tax authorities? Will Mr. White be compelled to justify his fee by introducing expert testimony from estate practitioners as to the work required, the complexity of the matter, and the benefit to the estate? Will he need to call to the witness stand other members of the Monroe County bar to attest to his experience, ability, and reputation?

Or will White be required to produce Surrogate Judge Ciaccio to testify as to community custom and practice regarding fees? If so, will the Service then be permitted to cross-examine the Surrogate as to whether he fully considered all the *Freeman* criteria before authorizing Mr. White's fee? Whether or not the Surrogate becomes a witness in federal court, such a trial would be demeaning to the Surrogate's Court and unfitting.

The freedom to second-guess sought by the IRS promises to trigger an explosion of penny-ante litigation in the district courts like the refund action White has already been compelled to bring (amount in issue: less than $6,000 [J.A. 22]). In recent years access to the federal courts has arguably contracted as disputes with major issues at stake have been relegated, under various doctrines, to the state courts. *See, e.g.*, Committee on Federal Courts of the New York State Bar Association, *Report on the Abstention Doctrine: The Consequences of Federal Court Deference to State Court Proceedings*, 122 F.R.D. 89 (1988). This case

[27] Surrogate Ciaccio has indicated that he would have awarded a fee larger than the fee actually requested by petitioner White. J.A. 38.

points the other way: the government seeks to convert a matter with very little at stake, that has already been decided by a competent and specialized state court, into a federal case.

The government's position is not consistent with notions of wise judicial administration, conservation of judicial resources, or comprehensive disposition of litigation. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 47 L. Ed. 2d 483 (1976). Principles of federalism are ill-served by federal court trials — whether by judge or by jury — of issues of the reasonableness of estate attorneys' fees. Surely Congress intended to preclude such a possibility when it authorized a deduction for such administrative expenses as are "allowable" under state law.

CONCLUSION

Nonenforcement of the IRS summonses in this case does not threaten, as the Second Circuit may have feared, to undermine the summons enforcement power of the Internal Revenue Service, which can still exercise its broad powers to investigate the possibility that state decrees have been obtained by collusion, fraud, or the like. On the other hand, permitting the IRS to review and redetermine reasonable attorneys' fee for services to estates would do violence to the congressional direction in I.R.C. Section 2053 to make deductibility of administration expenses dependent on what has been allowed under state law.

The IRS and the federal courts are not equipped to evaluate reasonable attorneys' fees. The result, if they are permitted to try, would be inconsistent results and further disrespect for state probate courts. The judgment of the Second Circuit Court of Appeals should, accordingly, be reversed, and the judgment of the district court should be affirmed.

April 25, 1989

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
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No. 88-928

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In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES M. WHITE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES M. SERLING

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the approval of an executor's commission and attorney's fee by a state probate court precludes the enforcement of an Internal Revenue Service summons seeking records relating to the administration of the estate for the purpose of determining the allowability of federal estate tax deductions claimed for that commission and fee.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (J.A. A62-A85) is reported at 853 F.2d 107. The opinion of the district court (J.A. A43-A61) is reported at 650 F. Supp. 904.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1988. A petition for rehearing was denied on October 6, 1988. The petition for a writ of certiorari was filed on December 3, 1988, and was granted on February 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 2053 and 7602 of the Internal Revenue Code (26 U.S.C.) and Section 20.2053-1 of the Treasury Regula-

tions on Estate Tax (1954 Code) are set forth in pertinent part in a statutory appendix to this brief (App., *infra*, 1a-4a).

STATEMENT

1. Petitioner was named as the executor of the estate of Helen P. Smith by her will, and he also chose to act as the estate's attorney. For these services, he claimed an executor's commission of $17,548 and an attorney's fee of $16,800, to be paid from the gross estate of $455,000.[1] Petitioner sought from the New York State Surrogate's Court of Monroe County a decree of judicial settlement of the estate, including authorization of the claimed executor's commission and attorney's fee. This proceeding was not adversarial, and petitioner did not submit to the Surrogate his time records or an affidavit detailing his services as an attorney.[2] The Surrogate granted the requested judicial settlement, which had the effect, *inter alia*, of fixing and approving petitioner's fees as executor of, and attorney for, the estate. J.A. A45-A47. Petitioner paid himself the attorney's fee and executor's commission approved by the Surrogate and distributed the balance of the funds to the residuary legatees. J.A. A14.

[1] New York law provides that the executor's commission is determined by a formula based on the value of the gross estate. An allowable attorney's fee is compensation that is "just and reasonable." N.Y. Surr. Ct. Proc. Act § 2307 (McKinney 1967 & Supp. 1989). The New York Court of Appeals in *In re Freeman*, 34 N.Y.2d 1, 9, 311 N.E.2d 480, 484, 355 N.Y.S. 2d 336, 341 (1974), listed the factors that are relevant in determining whether a claimed fee is "just and reasonable" as follows:

> time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the service; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved * * *.

[2] Had the proceeding been adversarial, court rules would have required petitioner to file an affidavit detailing his services. See J.A. A46 n.3.

On the estate's federal tax return, petitioner deducted attorney's fees of $16,530 and an executor's commission of $17,450. J.A. A66-A67.[3] Respondent Serling, an Internal Revenue Service (IRS) estate tax attorney, was assigned to review the estate tax return. J.A. A2. He requested from petitioner certain records pertaining to the justification for the legal fee, or, alternatively, an affidavit from petitioner detailing the legal services performed and the time spent on the services. See J.A. A32-A34. Petitioner responded that the IRS was bound to accept a deduction in the amount approved by the Surrogate; he also forwarded to respondent Serling a letter obtained from the Surrogate for use in the audit in which the Surrogate stated that the attorney's fee conformed to the criteria of reasonableness applicable under New York law and that he did not act arbitrarily in approving it. J.A. A35-A39.

[3] The record does not clearly indicate why the amounts claimed as deductions on the estate tax return were slightly smaller than the amounts awarded by the Surrogate. It appears that petitioner originally claimed the entire amount of the executor's commission as an estate tax deduction, but, after a conference with the IRS auditor, later filed an amended return reducing the claimed deduction because he recognized that a portion of the Surrogate's award was not deductible for purposes of the federal estate tax. See J.A. A14, A17. Subsequently, the IRS determined that the allowable executor's commission should be further reduced, and petitioner did not contest this additional reduction. See J.A. A49. It is not apparent why the full attorney's fee was not claimed as a deductible administrative expense. See J.A. A30.

Thereafter, on May 1, 1985, respondent Serling issued an administrative summons to petitioner, requesting records relating to the administration of the estate (see J.A. A5-A6). A second summons was issued on February 3, 1986, requesting records relating to petitioner's activities as attorney and executor (see J.A. A7-A8). Petitioner responded by letter that he would not comply with the summonses, relying on the Surrogate's prior approval of his attorney's fee (see J.A. A29-A32). The government then brought this action in the United States District Court for the Western District of New York to enforce the summonses (see J.A. A1-A4).[4]

2. The district court refused to enforce the summonses (J.A. A45-A61). The court held that "the IRS has not made the necessary showing that the investigation will be conducted pursuant to a legitimate purpose" (J.A. A50). The court noted that the governing statute, Section 2053(a) of the Internal Revenue Code,[5] permits the deduction of administration expenses "allowable" under state law, and the court relied upon the statement in the relevant Treasury regulation, 26 C.F.R. 20.2053-1(b)(2), that a local court's determination to allow an administration expense "will ordinarily be accepted [for federal estate

[4] In light of petitioner's refusal to comply with the summonses and the approaching expiration of the three-year statute of limitations on assessments (I.R.C. § 6501), the IRS issued a notice of deficiency to the estate, in which it disallowed the claimed attorney's fee and reduced the claimed deduction for the executor's commission from $17,450 to $16,804. Petitioner did not contest the reduction in the executor's commission. After paying the deficiency, however, he sought a refund, contesting the disallowance of the attorney's fee deduction. That separate refund suit is pending in district court, and this case does not involve the refund claim. J.A. A67-A68.

[5] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

tax purposes] if the court passes upon the facts upon which deductibility depends." J.A. A50-A51. The court stated that the IRS therefore cannot disallow the expenses approved by the Surrogate's Court, unless it makes a showing that the Surrogate did not pass upon the factors upon which deductibility depends. See J.A. A54 n.5, A59-A60. It further stated that principles of comity and federalism require deference to such a determination by a state court on a matter of state administration. J.A. A55-A58. Based on this analysis of the principles governing the merits of the claimed deductions, the court concluded that it would not enforce a summons issued to obtain information about the basis for expenses approved by the Surrogate's Court unless the IRS makes "a *prima facie* showing that the Surrogate's decision was motivated by factors other than those on which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate" (J.A. A59-A60).

3. The court of appeals reversed (J.A. A62-A85). It emphasized that the only issue before it concerned summons enforcement, noting that "[t]he issue presented to us is whether the IRS may investigate expenses claimed as a deduction on a federal estate tax return, and obtain enforcement of summonses issued to carry out such an investigation, where the subject expenses previously had been approved under state law by a state trial court" (J.A. A69). The court held that the government had clearly met the requirements set forth in *United States* v. *Powell*, 379 U.S. 48 (1964), for the enforcement of summonses (J.A. A69-A73). The court explained that "the primary issue presented by a summons proceeding is *not* whether the IRS has established, or is even likely to establish guilt or liability on the taxpayer's part; rather, the issue is whether the IRS had a valid tax determination or collection purpose in issuing its summons" (J.A. A71-A72).

The court of appeals concluded that the IRS had carried its burden of showing that the summons had been issued in good faith in furtherance of a legitimate tax investigation. The court emphatically rejected the district court's imposition of the additional requirement that the IRS make a *prima facie* showing that the Surrogate's decision was motivated by impermissible factors such as fraud, finding that this requirement was "virtually the same" as the proposition rejected by this Court in *Powell*, namely, that the IRS must make an advance showing of probable cause to suspect fraud in order to obtain enforcement of a summons designed to investigate fraud (J.A. A81). Because "the district court's requirement would be equally likely to hamper the IRS in carrying out investigations it thinks are warranted, and has already forced the IRS to litigate and prosecute an appeal on the very subject it desires to investigate," the court of appeals rejected the district court's additional requirement as "an invalid restraint on the summons powers of the IRS" (*ibid.*).

The court of appeals also rejected the district court's conclusion that Section 2053(a) and Treas. Reg. § 20.2053-1(b)(2) preclude the IRS from questioning the claimed deductions for petitioner's fees approved by the Surrogate and therefore that the summons cannot be regarded as issued for a valid tax investigation purpose (J.A. A73-A81). The court declared that the statute requires the IRS to apply state rules of law, but that the deductibility of expenses for purposes of the federal estate law is not necessarily controlled by the determination of a state trial court (J.A. A75). And the court of appeals found that this Court's decision in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967), in rejecting the taxpayer's contention that a state trial court decree was binding on the IRS for federal estate tax purposes, supported the conclusion that "the Surrogate's decree is not conclusive and

binding on the IRS" (J.A. A76). Correspondingly, the court concluded that Treas. Reg. § 20.2053-1(b)(2) "makes it clear that the IRS is entitled to make an independent assessment of applicable state law as interpreted by the state's highest court," and therefore it can "independently assess[] the deductibility of [petitioner's] fees under state law" (J.A. A79-A80).

Thus, the court held that "the mere fact that the Surrogate issued a decree does not preclude the IRS from investigating the deductibility of [petitioner's] fees under state law" (J.A. A76), and therefore an inquiry into the basis for petitioner's claimed fees was a legitimate purpose for the issuance of the summonses. The court emphasized that "the validity of the Surrogate decree is not at issue." Rather, the court's discussion was "intended solely to demonstrate that, contrary to [petitioner's] claim, the IRS may indeed *inquire* under § 2053 into the allowability of [petitioner's] fees under state law" (J.A. A78).

Finally, the court of appeals determined that, contrary to the district court's suggestion, principles of federalism and comity do not constitute "substantial countervailing policies" (*United States* v. *Euge*, 444 U.S. 707, 711 (1980)) that justify a special restriction here on the IRS's broad summons power (J.A. A83-A84). The court of appeals noted that this case does "not implicate the eleventh amendment, full faith and credit, principles of collateral estoppel, or other doctrines arising from principles of federalism and comity * * *" (J.A. A84). The Court concluded (*ibid.*, quoting *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (emphasis by the Court)): "Instead of substantial countervailing policies, we find in I.R.C. § 7602 'a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry.' "

SUMMARY OF ARGUMENT

A. The issue in this case is the enforceability of two IRS summonses. It is undisputed that the summonses were not issued in bad faith in pursuit of some improper purpose, such as harassment; rather, they were issued to petitioner for the purpose of investigating the federal tax liability of the estate for which he acted as executor. Accordingly, the summonses satisfied the criteria for enforcement that have been well settled since *United States* v. *Powell*, 379 U.S. 48 (1964).

A summons enforcement proceeding does not encompass disputes over the merits of the underlying tax liability. Therefore, petitioner's objection to the summonses on the ground that the Surrogate correctly approved the claimed attorney's fee is premature and can provide no basis for denying the IRS the opportunity to investigate the basis for that fee. Only if the Surrogate's determination were *in all circumstances* binding on the federal authorities could it be argued that the IRS had no right to investigate the basis for the fee. It is clear, however, that the Surrogate's determination has no such conclusive effect.

Treas. Reg. § 20.2053-1(b)(2) provides that the decree of a state trial court will ordinarily be accepted for purposes of deducting administration expenses on an estate tax return "if the court passes upon the facts upon which deductibility depends." Whatever the precise scope of federal inquiry under I.R.C. § 2053(a) and this regulation, the district court and petitioner agree that, at a minimum, the IRS is not bound to follow a Surrogate's decree if it was "motivated by factors other than those on which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate" (J.A. A59-A60; see Pet. Br. 15, 45). Thus, the IRS was entitled

to investigate the basis of the claimed fee at least to determine whether the Surrogate's approval was motivated by such impermissible factors; there was therefore a legitimate tax investigation purpose for the summonses.

It is well established that the IRS need not establish any threshold of suspicion in order to justify the issuance of an investigative summons. The district court therefore plainly erred in holding that the summonses could not be enforced unless the IRS first made a prima facie showing of fraud or the like; that prerequisite to enforcement is virtually the same as the one rejected by this Court in *Powell*. Nor is it necessary for the IRS to allege that its investigation is focused on the possibility of such illegitimate factors. A general investigation into the basis for the claimed fee legitimately encompasses the possibility of fraud, as well as other possible explanations for a fee suspected of exceeding that allowable under state law. The IRS is able to make an informed judgment about the deductibility of the fee only if it is permitted to conduct an inquiry; therefore, the summonses requesting material relevant to that inquiry should have been enforced.

B. Although it is not necessary to resolve the question in order to decide this case, the court of appeals correctly stated that the scope of the IRS investigation need not be limited to fraud or other impermissible factors because the federal courts are not bound by a state trial court decree that incorrectly applies state law. Section 2053(a) allows the deduction of administration expenses "allowable by the laws" of the state; this language, and the statute's almost identical formulations dating back to 1916, clearly contemplate that the federal court should determine the correct application of state law and not limit its inquiry to determining whether the expenses were approved by a state trial court as a matter of historical fact. That interpretation is confirmed by the relevant Treasury regulation,

which has consistently provided since 1921 that a local court decree will not be accepted if it is "at variance with the law of the State" (see Treas. Reg. § 20.2053-1(b)(2)), and by the line of judicial decisions that has recognized that it is proper for a federal court to depart for this purpose from a state court decree if that decree does not correctly implement state law.

Indeed, in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967), this Court explicitly held that, "when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should * * * not be controlling." The principles of *Estate of Bosch* are fully applicable here. The state law that is to be applied under Section 2053 is the law reflected in the decisions of the state's highest court. If there has been no definitive determination by that court of the particular question presented, the federal court must apply what it finds to be the state law; its conclusion will not necessarily accord with the holding of a state trial court. Here, where the Surrogate's fee awards are subject to challenge and reduction by the New York appellate courts on grounds of legal error, *Estate of Bosch* unmistakably teaches that the Surrogate's decree is not entitled to conclusive effect in federal estate tax litigation.

A blind adherence to state trial court decrees, regardless of whether they correctly implement state law, would "jeopardize the federal revenue" (*Commissioner* v. *Estate of Bosch*, 387 U.S. at 464). This danger is particularly acute in a situation like the one presented here—where the Surrogate's proceeding was uncontested, where petitioner's service in a dual capacity raises the possibility that the attorney's fee was impermissibly paid in part for services that were the duty of the executor, and where the record before the Surrogate did not detail the services for which the fee was claimed. In these circumstances, the IRS's responsibility to the public fisc would be undermined if it

were not permitted even to investigate the basis for the claimed fee. Rather, Congress has chosen an appropriate balance in Section 2053 that reflects a due regard for principles of federalism and for the fair administration of the federal revenue laws. Administration expenses are deductible for federal estate tax purposes if they are allowable under state law, but the federal courts are authorized to make that determination according to the rules laid down by the state's highest court (with proper regard for decisions by lower courts); the federal courts are not bound by an erroneous determination of a state trial court.

ARGUMENT

THE SUMMONSES WERE ISSUED IN FURTHERANCE OF A LEGITIMATE TAX INVESTIGATION PURPOSE AND SHOULD HAVE BEEN ENFORCED

The issue in this case is the enforceability of two IRS summonses. In order to assist in the determination of the amount of the federal estate tax due from the estate of which petitioner was the executor—in particular, the correctness of the deductions claimed by the estate for the executor's commission and attorney's fee—the IRS issued summonses to petitioner seeking certain records pertaining to the administration of the estate. It is undisputed that these summonses were issued, not for a purpose that this Court has identified as illegitimate—such as to harass petitioner or to put pressure upon him to resolve a collateral dispute (see *United States* v. *Powell*, 379 U.S. 48, 58 (1964))—but rather for the purpose of investigating the estate's tax liability. Under well established principles of summons law, the summonses therefore should have been enforced to permit the IRS to *inquire* into the correctness of the claimed deductions. Accordingly, the court of appeals was correct in reversing the district court's holding

that the summonses could not be enforced unless the IRS made a prima facie showing that there was fraud or similar impermissible factors in the state court proceeding that approved the claimed fees.

Petitioner's objection to the summonses rests on the premise that the IRS must invariably accept the amount of the fee approved by the Surrogate as the amount deductible for purposes of the federal estate tax. From this premise, petitioner argues that the IRS's investigation here is pointless because the claimed deductions will be allowed regardless of what information is contained in the summoned documents, and therefore petitioner argues that the summonses have not been issued for a legitimate investigative purpose. Petitioner's premise is erroneous. Nothing in the Internal Revenue Code or the relevant regulations requires that the federal estate tax deduction for administration expenses be absolutely controlled by a state court decree authorizing the payment of a certain amount as an attorney's fee. While the state court's determination is entitled to proper regard in a federal court, the Code does not authorize a deduction for the approved fee if the amount is not allowable under state law. Moreover, as even the district court acknowledged, a state court decree procured by fraud or overreaching cannot control the validity of a federal estate tax deduction. Hence, it is a legitimate subject of government investigation for the IRS to inquire whether this case presents circumstances that warrant denial of a deduction in the amount approved by the Surrogate, and the summonses should have been enforced to permit the IRS to obtain the information that would enable it to make that determination.

A. The District Court Erred In Requiring, As A Precondition To Enforcement Of The Summonses, A Prima Facie Showing That The Summoned Information Likely Will Lead To An Adjustment In The Taxpayer's Liability

1. Congress has conferred upon the Secretary of the Treasury the responsibility to make accurate determinations of tax liability and has given him broad authority to conduct investigations for that purpose. The Commissioner of Internal Revenue, as the Secretary's delegate, is charged with the duty "to make inquiries, determinations, and assessments of all taxes" imposed by the Code (I.R.C. § 6201(a)). The summons power is the investigative tool provided by Congress to enable the Commissioner to discharge this responsibility. Section 7602 of the Code authorizes the Commissioner, "[f]or the purpose of ascertaining the correctness of any return, * * * [or] determining the liability of any person for any internal revenue tax, * * * [t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry" and to summon any person to appear and produce such documents and to give relevant testimony. If the summoned party refuses to produce the requested documents, the IRS must go to court to compel compliance with the summons (see I.R.C. §§ 7402(b), 7604(a), and 7609(h)(1)). The court's role, however, is limited to determining whether the particular summons is a legitimate exercise of the IRS's investigative authority; the court is not empowered to second-guess the wisdom of the IRS's investigative decisions.

Thus, in *United States* v. *Powell*, 379 U.S. 48 (1964), this Court specifically held that the summons enforcement court should not inquire into the strength of the Commissioner's reasons for believing that the summoned material will contribute to a redetermination of tax liability. In *Powell*, the statute of limitations for the tax year in ques-

tion had already expired, and therefore the tax investigation could be productive in terms of tax liability only if the Commissioner could prove fraud (for which there is no statute of limitations). The taxpayer contended that the summons should not be enforced unless the Commissioner could establish probable cause for suspecting fraud, but this Court emphatically rejected that contention. The Court explained that there was no reason for believing that "Congress intended the courts to oversee the Commissioner's determinations to investigate" (*id.* at 56); establishing a judicially-enforced standard, such as probable cause, for those determinations, "might seriously hamper the Commissioner in carrying out investigations he thinks warranted, forcing him to litigate and prosecute appeals on the very subject which he desires to investigate" (*id.* at 54). Instead, the Court analogized the summons power to the subpoena power of other government agencies, noting that the inquiry is not "limited . . . by forecasts of the probable result of the investigation" and that the government "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not" (*id.* at 57 (internal quotation marks omitted)).

The Court in *Powell* proceeded to delineate the proper scope of the district court's inquiry in a summons enforcement proceeding. In order to obtain enforcement, the Commissioner is required to "show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed" (379 U.S. at 57-58). The Court added that this does not mean that the district court cannot make any inquiry at all into the underlying reasons for the summons, stating that "a court may not permit its

process to be abused" (*id.* at 58). The Court explained that "[s]uch an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation" (*ibid.*). Under the framework established in *Powell*, therefore, a summons is to be enforced if the court concludes that it was issued in "good faith," *i.e.*, in furtherance of a legitimate purpose for which the use of the summons authority has been authorized by Congress. See also, *e.g.*, *United States* v. *Stuart*, 109 S. Ct. 1183, 1187-1188 (1989); *United States* v. *Euge*, 444 U.S. 707, 714-717 (1980); *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975). As long as those criteria are met, the summons must be enforced, irrespective of the likelihood that the investigation will prove to be fruitful.

2. a. The summonses issued in this case satisfied the *Powell* criteria and therefore should have been enforced. It cannot seriously be doubted that the IRS made a prima facie case for enforcement under the established standards. The initial burden of proof on the government in a summons enforcement proceeding is often described as "slight" or "minimal"; the burden is carried by the submission of an affidavit of an agent involved in the investigating stating that the summons complies with each of the *Powell* requirements. See, *e.g.*, *Alphin* v. *United States*, 809 F.2d 236, 238 (4th Cir.), cert. denied, 480 U.S. 935 (1987); *Liberty Financial Services* v. *United States*, 778 F.2d 1390, 1392 (9th Cir. 1985); *United States* v. *Balanced Financial Management, Inc.*, 769 F.2d 1440, 1443 (10th Cir. 1985); *United States* v. *Kis*, 658 F.2d 526, 536 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). This burden plainly was carried by the declaration of the person who issued the summons, respondent Serling. See

J.A. A72-A73. The declaration stated that he was an IRS estate tax attorney conducting an examination to determine the correct estate tax liability of the estate of Helen P. Smith, that he had learned that petitioner had served as both attorney and executor for the estate and was in possession of records relating to the estate's tax liability, that the summoned books and records were necessary for the correct determination of the estate's tax liability, that those records were not already in the possession of the Internal Revenue Service, and that the administrative steps required by the Internal Revenue Code for the issuance of a summons had been taken. J.A. A11.[6]

b. Once the IRS carries its initial burden, the summoned party has the burden of rebutting the IRS's showing by demonstrating that the summons was issued for an illegitimate purpose or that the *Powell* criteria are not satisfied for some other reason. See, *e.g., United States* v. *LaSalle Nat'l Bank,* 437 U.S. 298, 316 (1978); *United States* v. *Powell,* 379 U.S. at 58. Petitioner has not sought to rebut the prima facie showing in this case by demonstrating that the summonses were issued for an improper purpose of the kind described in *Powell,* such as harassment. Instead, he emphasizes (Br. 14-16) that the focus of the IRS's investigation was upon the validity of the attorney's fee deduction, and that the specific purpose of the summonses "was to make a collateral review of the reasonable value of his services as an attorney" (Br. 14). Petitioner contends that this purpose is improper because, he asserts, the IRS is powerless to disallow a claimed deduction for fees approved by the Surrogate—regardless of the outcome of the investigation. There is no force to this objection to the enforceability of the summonses.

[6] While petitioner briefly asserts (Br. 13-14) that the petition for enforcement and respondent Serling's affidavit did not carry the Commissioner's initial burden of proof, petitioner does not explain why the Commissioner's showing should be regarded as insufficient. The affidavit plainly stated that the records were sought in connection with an investigation into the tax liability of the estate; that is a legitimate purpose for the issuance of a summons and the requested records undoubtedly could be relevant to such an investigation. Petitioner cites no authority suggesting that an affidavit of the sort filed in this case is inadequate to establish a prima facie case for the enforcement of a summons.

At the outset, it is clear that it is inappropriate to litigate the merits of a tax dispute in a summons enforcement proceeding. These proceedings are designed to be "summary" (*United States* v. *Stuart,* 109 S. Ct. at 1193; *Donaldson* v. *United States,* 400 U.S. 517, 529 (1971)), limited to determining whether the summons was issued in good faith for a legitimate investigative purpose. As we have explained (pp. 13-15, *supra*), an inquiry into the prospects of the investigation is not relevant at the summons enforcement stage, and it is equally true that there should be no inquiry into the merits of the underlying tax dispute at that stage. Thus, petitioner's objections in the summons enforcement proceeding—that the Surrogate's after-the-fact letter defending his approval of petitioner's fee (see J.A. A38-A39) should have resolved the question of deductibility (see C.A. App. 74-75) and that the IRS was going to apply an incorrect standard in evaluating the fee (see C.A. App. 76-77)—were premature in that setting because they were addressed to the merits of the particular tax dispute in this case. Cf. *FTC* v. *Standard Oil Co.,* 449 U.S. 232 (1980). Those objections could not form the basis for denial of enforcement of a summons. See J.A. A81-A82. And the determination of the appropriate scope of the investigation "is one for the IRS—not [the taxpayer]—to make" (*Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 323 (1985)).

Accordingly, the only conceivable basis for arguing that examination of the validity of an estate tax deduction for administration expenses is not a legitimate purpose for issuing a summons is to assert that *in no circumstances* is the IRS permitted to disallow a deduction for those expenses that have been approved by the Surrogate; only on that premise would it be arguable that a summons to investigate the basis for that expense, or for the Surrogate's approval of it, is pointless and should not be enforced. That essential premise for the argument, however, is clearly mistaken. As the court of appeals held (J.A. A76), "the mere fact that the Surrogate issued a decree does not preclude the IRS from investigating the deductibility of [petitioner's] fees under state law" because it is manifest that there are circumstances under which the IRS should deny a deduction for administration expenses that have been approved by the Surrogate, including an attorney's fee. Treas. Reg. § 20.2053-1(b)(2) provides that the decree of a local court will ordinarily be accepted for purposes of deducting administration expenses on an estate tax return "if the court passes upon the facts upon which deductibility depends." The district court accepted this limitation, explicitly stating that the IRS is not bound to follow a Surrogate's decree if it was "motivated by factors other than those on which deductibility depends, such as fraud, overreaching, or excessiveness by the attorney or the Surrogate" (J.A. A59-A60), and petitioner does not dispute that the IRS is entitled to disregard the Surrogate's decree in such circumstances (see Br. 15, 45). Thus, there is simply no basis for petitioner's argument that the deductibility of an attorney's fee that has been approved by the Surrogate is not a legitimate subject of IRS investigation.

As we have explained, it is well established that there is no threshold of suspicion that must be demonstrated by the IRS in order to justify the issuance of a summons for

records relevant to a legitimate area of investigation. Therefore, the court of appeals was plainly correct in reversing the district court's holding that the summonses would not be enforced unless the IRS could make a prima facie case of fraud or some other reason to believe that the Surrogate had been motivated by factors other than those upon which deductibility depends. As the court of appeals noted (J.A. A81), the precondition imposed by the district court is "virtually the same" as that rejected by this court in *Powell*, "namely, that the IRS must make an advance showing of probable cause to suspect fraud." The summons is the IRS's principal investigatory tool through which it is enabled to inform itself of such subjects as fraud; the IRS is not required to make a showing of the investigation's fruits before it is allowed to conduct its inquiry.[7]

Similarly, petitioner errs in stating (Br. 15) that the summonses should not be enforced in the absence of an allegation that the investigation would focus upon the possibility

[7] In fact, the summonses in this case were not issued in a vacuum; the IRS had reason to suspect that the fee approved by the Surrogate might exceed that allowable under state law. Petitioner had served as both attorney and executor of the estate, a practice that has been criticized because of the possibility that an individual will collect an attorney's fee for services for which he is also compensated by the executor's commission. The IRS was aware that the Surrogate's decree had been entered in an uncontested proceeding in which the record did not establish the services for which the attorney was being paid—and therefore did not indicate whether any part of the fee was claimed for services that are the executor's responsibility. Moreover, the district court itself commented on the size of the fee (J.A. A70). See generally pp. 37-41, *infra*. And, as the court of appeals noted (J.A. A81), "no record evidence, as such, had been presented to the district court that would have enabled it to decide whether the Surrogate passed on the facts upon which deductibility depends. The post hoc letter from the Surrogate justifying its decision is not sufficient to eliminate inquiry into whether the Surrogate actually considered the appropriate facts."

of fraud or overreaching. Although the IRS did not explicitly state in the petition for enforcement that it suspected fraud, that does not exclude fraud as one of the areas of investigation. The IRS believed that there was reason to question the amount that the estate sought to deduct as an attorney's fee, and it sought to investigate that issue. Until it can examine the relevant records, the IRS is not in a position to judge whether the fee is excessive at all, much less to judge whether there was fraud or simply a difference of opinion between the IRS and the Surrogate as to the reasonableness of the fee.[8] As the court of appeals explained (J.A. A81), "at [the] summons enforcement stage, * * * the IRS seeks to *inquire* into the facts that bear on the deductibility of [petitioner's] fees, and not to accuse the Surrogate of error." Thus, there is certainly no reason to insist, as a precondition to summons enforcement, that the IRS allege fraud or overreaching before it has had an adequate opportunity to investigate.[9]

[8] This was the import of the IRS's attorney's statement at the district court hearing that "I'm not here to attack the Monroe County Surrogate in any sense" (C.A. App. 83), which petitioner mischaracterizes as "disclaim[ing] any * * * concern" about fraud (Br. 15). As the IRS's attorney continued (C.A. App. 84): "It may be in this case that [petitioner's] fee is more than justified, but until the IRS is given the data to support that claimed deduction, they do not have to allow it and they are entitled to get that information under the summons." The IRS's position in the summons enforcement proceeding was simply that it is entitled to examine the relevant records in order to be able to make a determination as to the basis for the attorney's fee award and whether the full amount should be allowed as an estate tax deduction. Without such an examination, it was in no position to allege fraud or any other specific basis for disallowing the claimed deduction.

[9] To be sure, the IRS's determination to inquire into the validity of the fee deduction was not based solely on the possibility of fraud or overreaching. The government has consistently maintained throughout this litigation that, even if there is no fraud or over-

The claimed deduction for the attorney's fee was a legitimate subject for the IRS's investigation of the estate tax liability, and the summonses issued in this case fell well within the IRS's broad summons authority. Section 7602 of the Code entitles the government to summon all records that "may be relevant" to an inquiry into tax liability. As this Court explained in *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814 (1984):

> The language "may be" reflects Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until they are procured and scrutinized.

And the Court has noted that the IRS can issue a summons to investigate " 'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' " *United States* v. *Powell*, 379 U.S. at 57 (quoting *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642 (1950)). Under the statutory framework, the summoned records were clearly relevant to the determination of the estate's tax liability – including resolution of the possibility that the Surrogate's approval of petitioner's attorney's fee should not be accepted because of fraud or some other reason. Just as this Court held that the summons in *Powell*

reaching and the Surrogate has passed on the relevant facts, the IRS can disallow a claimed deduction for fees that have been approved by the Surrogate if those fees are not "allowable under state law" (I.R.C. § 2053). See Point B, *infra*. But the critical point here is that, even if the government's contention in this regard is incorrect, the summonses in this case are still enforceable because the summoned documents are relevant to an inquiry into whether the Surrogate's decree was procured by fraud or overreaching, which concededly would furnish a basis for disallowing the claimed deduction.

was enforceable because the Commissioner had determined that examination of the taxpayer's records was necessary "in order to determine the existence or nonexistence of fraud in the taxpayer's returns" (379 U.S. at 53), so too the summonses here were enforceable in order to allow the IRS to determine the existence or nonexistence of fraud or overreaching in the Surrogate's approval of petitioner's claimed fee.[10]

B. Administration Expenses Approved By A State Trial Court Are Not Deductible For Federal Estate Tax Purposes If They Are Not Allowable Under A Correct Interpretation Of State Law

As we have explained in Point A, the summonses in this case should have been enforced in order to permit the IRS

[10] Amici object to the summonses on a ground never raised by petitioner—namely, that the summonses were "overbroad" (Br. 13). Amici appear to confuse a summons that merely requests more material than may ultimately be necessary for the tax determination, as the summonses in this case arguably did, with one that does not advise the summoned party what is required of him with sufficient specificity. See, *e.g.*, *United States* v. *Wyatt*, 637 F.2d 293, 300-302 (5th Cir. 1981). The latter summons may be rejected as "overbroad," *i.e.*, as an unreasonable search in violation of the Fourth Amendment, but the summonses here plainly identified the materials sought with sufficient specificity and hence they were not defective as "overbroad." A summons that merely requests more material than may ultimately prove necessary to the tax determination is not invalid so long as such material "may be relevant" to that inquiry. See, *e.g.*, *United States* v. *Berney*, 713 F.2d 568, 571-572 (10th Cir. 1983); *United States* v. *Davis*, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981); see generally *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. at 323. At any rate, petitioner did not complain about the scope of the summonses and made no effort to negotiate with respondent Serling to narrow the request. Indeed, the objection to the scope of the summonses is particularly misguided given that respondent Serling

to investigate the possibility that the claimed deduction for the approved executor's commission and attorney's fee should be disallowed on the ground that the Surrogate did not pass upon the facts upon which deductibility depends—because of fraud or some other reason. The existence of that legitimate avenue of IRS investigation is sufficient to require affirmance of the decision below and enforcement of the summonses. The court of appeals also stated that the IRS's investigation need not be confined to the question of fraud because the IRS is not required to allow a deduction for fees approved by the Surrogate in every instance where he has passed on the facts upon which deductibility depends; if the Surrogate's determination is incorrect and the approved fees are not allowable under a correct interpretation of state law, they are not deductible for purposes of the federal estate tax. While we do not believe that decision of this issue—concerning a premature question of the merits of the claimed deduction—is necessary to a resolution of this case, this statement by the court of appeals is correct.

1. Section 2053(a) of the Code and the Relevant Treasury Regulations Provide that a Local Court's Determination to Approve Administration Expenses Will Not Govern Deductibility for Federal Estate Tax Purposes when that Determination Does Not Comply with State Law

The statutory provision permitting deduction of administration expenses from a decedent's gross estate (now codified in Section 2053(a)) is one of long standing, and its text has consistently manifested Congress's intent that such expenses not be deductible unless they are allowable under the relevant state law, regardless of whether they

had informed petitioner at the outset that he could submit an affidavit detailing his services in lieu of the requested records. See J.A. A33.

have been approved by a state trial court. Section 203(a)(1) of the Revenue Act of 1916, ch. 463, 39 Stat. 778, permitted deduction of "[s]uch amounts for funeral expenses, administration expenses, [and] claims against the estate * * * as are allowed by the laws of the jurisdiction * * * under which the estate is being administered." Section 812(b) of the Internal Revenue Code of 1939, ch. 2, 53 Stat. 123, contained essentially identical language. These statutory provisions clearly did not make deductibility of administration expenses and claims against the estate turn exclusively on a historical fact—namely, whether a trial court has approved a particular claim or expense. Rather, in couching the test in terms of "the laws of the jurisdiction," these provisions contemplated a legal inquiry into the correct application of those laws. State trial courts sometimes err and approve administration expenses that are not in fact allowable under state law. The plain import of the statutory language of these early versions of Section 2053(a) is that, in those situations, the expenses are not deductible because they are not "allowed by the laws of the jurisdiction."

The current version of the statute even more clearly reflects this congressional intent. When the Internal Revenue Code of 1954 was adopted, many provisions were recodified, including the estate tax deduction for administration expenses. The 1954 version, which is currently in effect, permits the deduction of such administration expenses and claims against the estate "as are *allowable* by the laws of the jurisdiction" (I.R.C. § 2053(a) (emphasis added)). As petitioner notes (Br. 26), Congress did not intend that this reformulation would change existing law; Congress intended to make only one specific change in the provision governing deductibility of administration expenses—a change that is not relevant here. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. 91, A317 (1954); S. Rep.

No. 1622, 83d Cong., 2d Sess. 124, 473-474 (1954). Thus, the minor textual change from "allowed" to "allowable" was made not for substantive purposes, but for clarification. The current version even more clearly states the rule that administration expenses and claims against the estate are deductible when they are authorized by the laws of the jurisdiction, whether or not approved by a local court. Section 2053 cannot reasonably be read to direct a court to examine only the historical fact of approval by a court; the text of the statute does not permit the deduction of expenses or claims that are not allowable under a correct interpretation of state law, even if they have been approved by a state trial court.

The plain meaning of the statute is confirmed by the contemporaneous and consistent interpretation of the agency responsible for its administration. In 1921, the Treasury promulgated regulations regarding the administration expenses deduction. Article 41 of Treasury Regulations 37 (1921 ed.) provided that attorney's fees were a permissible deduction on the estate tax return even though they had not been approved by the local court (and thus "allowed" as a historical fact). By the same token, Article 39 provided that, where a local court had approved an administration expense, that decision was not binding for federal tax purposes under all circumstances:

> *Effect of court decree.*—The decision of a local court as to the amount of a claim or administration expense will ordinarily be accepted where the court passes upon the fact upon which deductibility depends. Where the court does not pass upon such fact its decree will, of course, not be followed. * * * Nor will the decree necessarily be accepted even where it purports to decide the fact upon which deductibility

> depends. It must appear that the court actually passed upon the merits of the case. This will be presumed in all cases where there is an active and genuine contest. Where the decree was rendered by consent, it will be accepted, provided the consent was a *bona fide* recognition of the validity of the claim—not a mere cloak for a gift—and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, where it is made by all parties having an interest adverse to the claim, when all aspects of the matter, including its effect upon taxation, are considered. The decree will not be accepted where it appears to be at variance with the law of the State; as, for example, if an allowance is made to an executor in excess of the rate prescribed by statute.

These regulations were continued virtually without change under several subsequent Revenue Acts. See Treas. Reg. 63, arts. 33, 37 (1922 ed.); Treas. Reg. 70, arts. 30, 34 (1926 ed.); Treas. Reg. 70, arts. 30, 34 (1929 ed.); Treas. Reg. 80, arts. 30, 34 (1934, 1937 eds.); Treas. Reg. 105, §§ 81.30, 81.34 (1939 ed.).

The current regulations under Section 2053 are almost identical to those promulgated under prior revenue acts dating back to 1921. Treas. Reg. § 20.2053-3(a) provides that administration expenses include attorney's fees, and Treas. Reg. § 20.2053-3(c)(1) provides that an estate tax deduction may be taken for attorney's fees that have actually been paid or that, at the time of filing, may reasonably be expected to be paid. These regulations must be read in conjunction with Treas. Reg. § 20.2053-1(b)(2), the successor of Article 39 of the 1921 Regulations. That regulation provides that a local court decree "will *ordinarily* be accepted if the court passes upon the facts upon

which deductibility depends" (emphasis added). Even if the court does pass on the relevant facts, the regulation explicitly states that "[t]he decree will not be accepted if it is at variance with the law of the State."

Thus, the current regulation, like its predecessors, clearly contemplates that there will be cases in which a lower court decree is not followed because it does not correctly implement state law. This longstanding regulation is entitled to considerable deference and is a strong indicator of Congress's intent. See, *e.g., National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476-477 (1979); *United States* v. *Correll*, 389 U.S. 299, 305-306 (1967) (quoting *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.")). In sum, petitioner's assertion (Br. 20) that "Congress clearly sought to preclude a threat of inconsistent determinations by state and federal authorities" is belied by both the plain meaning of Section 2053 and the Treasury regulations dating back to 1921. While it established that state law would provide the standard for evaluating the deductibility of administration expenses, Congress plainly did not provide that the federal courts, in determining an issue of federal tax liability, would invariably be bound by the decree of a state trial court, no matter how erroneous as a matter of law.[11]

[11] The question of the authority that must be accorded to a state trial court decree is purely one of interpretation of congressional intent in the Internal Revenue Code. There can be no claim that the state court decree has any collateral estoppel or res judicata effect with respect to the estate's federal tax liability. The United States was not a party to the state court proceedings. Nor would it be practical for the government to seek to assert its tax contentions in the state pro-

The acceptance of Treas. Reg. § 20.2053-1(b)(2) is reflected in numerous court decisions, which have almost uniformly recognized that Section 2053(a) permits a federal court considering the validity of a claimed estate tax deduction to depart from a state court decree on the ground that it does not accord with state law. In *First-Mechanics Nat'l Bank* v. *Commissioner*, 117 F.2d 127 (3d Cir. 1940), the court disallowed an estate tax deduction sought under Section 2053 for a claim against the estate that had been allowed by the state probate court. The court declared that the Treasury regulation correctly implemented the congressional intent establishing as a prerequisite to deductibility "that the claim be established as a valid charge against the decedent's estate under the laws of the state" (117 F.2d at 129-130). It noted that the regulation provided that a state court decree was ordinarily determinative of the validity of a claim against the estate, but explained that "that is so only because the state court has passed upon the merits of the claim and has adjudicated its validity according to the laws of the state" (*id.* at 129). The court then held that "Congress did not intend that a claim which could not be established on its merits as a valid liability of a decedent's estate should be accorded deduction for federal tax purposes merely because a state court approved, pro forma, the executors' payment of the claim, no sui juris interested party objecting" (*id.* at 130). The court of appeals in *Kasishke* v. *United States*, 426 F.2d 429, 435 (10th Cir. 1970), also rejected a claimed deduction for a claim against the estate that had been approved by the local court, explaining that "[t]he mere fact that the claim has been allowed by the executor and approved *pro forma* by the probate court will not establish deductibility if the validity of the claim on the merits cannot be otherwise established."[12]

ceedings, which often occur prior to the very claim of a tax deduction that is at issue—let alone prior to the conduct of the IRS's investigation.

The cases relied upon by petitioner are not to the contrary. In *Goodwin's Estate* v. *Commissioner*, 201 F.2d 576 (6th Cir. 1953) (see Pet. Br. 25-26), the court affirmed the validity of the Treasury regulation, noting that "the Regulations follow the authority of the statute in declaring that payment of claims out of the estate must be 'authorized by the laws of the jurisdiction' " (201 F.2d at 580 (quoting Treas. Reg. 105, § 81.30 (1939 ed.)). The court upheld the claimed deduction in that case because it found that the probate court decree had been entered after a hearing at which the court had heard testimony and accepted the consent of the adversely affected parties "as satisfactory evidence upon the merits" within the meaning of the regulation (201 F.2d at 580.). The court added that the presumption of the validity of the claim was not rebutted (*ibid.*); it did not suggest that the decree would have been followed even if it had been shown to be contrary to state law.

Similarly, the other cases relied upon by petitioner (Br. 27-28) and amici (Br. 16) do not purport to hold that a state trial court decree is binding for federal estate tax pur-

[12] See also *Estate of Smith* v. *Commissioner*, 510 F.2d 479, 482 (2d Cir.), cert. denied, 423 U.S. 827 (1975); *Wolfsen* v. *Smyth*, 223 F.2d 111 (9th Cir. 1955); *Jones* v. *United States*, 424 F.Supp. 236, 239 (E.D. Ill. 1976); *First National Bank* v. *United States*, 301 F. Supp. 667, 672-675 (N.D. Tex. 1969) (attorney's fee); *Estate of Lewis* v. *Commissioner*, 49 T.C. 684, 688 (1968); *Estate of Nesselrodt* v. *Commissioner*, 51 T.C.M. (CCH) 1406 (1986); *Estate of Bath* v. *Commissioner*, 34 T.C.M. (CCH) 493 (1975); *Estate of Nilson* v. *Commissioner*, 31 T.C.M. (CCH) 708 (1972). Contra *Bank of Nevada* v. *United States*, 80-2 U.S. Tax Cas. (CCH) ¶ 13,361 (D. Nev. 1980); *First National Bank* v. *United States*, 77-2 U.S. Tax Cas. (CCH) ¶ 13,207 (D. Nev. 1977).

poses if the expense is not allowable under a correct interpretation of state law. In *Dulles* v. *Johnson*, 273 F.2d 362, 369 (2d Cir. 1959), cert. denied, 364 U.S. 834 (1960), the court of appeals concluded that it was "clear that these amounts were allowed by the Surrogate's Court in accordance with the law of New York." In *Estate of Jenner* v. *Commissioner*, 577 F.2d 1100, 1106-1107 (7th Cir. 1978), the court found that there was "ample evidence in the record to support the state probate court's implicit finding" that the claimed administration expenses were allowable under state law. Indeed, the court of appeals' subsequent statement (*id.* at 1107) that it was therefore unnecessary to remand the case to the Tax Court to consider that issue evidences the court's recognition that the probate court's allowance of the expenses would not have been conclusive if it had been contrary to state law. In *Estate of Park* v. *Commissioner*, 475 F.2d 673, 676 (6th Cir. 1973), the court did not rely upon the fact of probate court approval, but rather based its decision on the fact that the claimed expenses were "admittedly allowable under Michigan law." And in *Ballance* v. *United States*, 347 F.2d 419, 423 (7th Cir. 1965), the court of appeals examined the merits and found the claimed expense deductible because "the expenditure for such post-death interest is, under Illinois law, an allowable expense of administration"; it did not hold that the probate court's decision was binding. Thus, the judicial decisions in this area confirm the validity of Treas. Reg. § 20.2053-1(b)(2) and the authority of federal courts to deny a federal estate tax deduction for administration expenses on the ground that they are not allowable under state law, even if the expenses have been approved by a state trial court.

2. ***This Court Has Recognized that Federal Estate Tax Consequences Should Not Necessarily Be Governed by the Decree of a State Trial Court***

In a closely analogous context, this Court has already resolved the question whether a state trial court decree has a binding effect in federal estate tax litigation. In *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967), this Court rejected the taxpayers' claim that a federal court is bound to accept, for purposes of estate tax litigation, a state trial court's determination of property rights, even though state law formed the basis of decision for the federal court litigation. The Court explicitly held that, "when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should * * * not be controlling." *Id.* at 465. Noting that the issue in the federal proceeding was the computation of the federal estate tax, the Court observed that, "[i]f the Congress had intended state trial court determinations to have [conclusive] effect on the federal actions, it certainly would have said so—which it did not do" (*id.* at 464). The Court explained that "the State's highest court is the best authority on its own law" (*id.* at 465), and therefore its decisions must be followed. But if there is no decision on the question in issue by the state's highest court, then the "federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State;" in effect, the federal court "sit[s] as a state court." *Ibid.* The Court equated this inquiry with that conducted by a federal court exercising diversity jurisdiction (*ibid.*)—an "independent examination of the state law as determined by the highest court of the State" (*id.* at 463).

Although petitioner is correct in noting that the issue in *Estate of Bosch* concerned the allowable marital deduction

under Section 2056 of the Code, rather than the administration expenses deduction of Section 2053 involved here, the principles of *Estate of Bosch* are equally applicable to the state court decree in this case.[13] In both cases, it is clear that state law provides the rule of decision, but Congress did not indicate that a state trial court decree should be dispositive. Moreover, the Court's conclusion that the best way of determining state law is for the federal court to inquire into that law "sitting as a state court" (387 U.S. at 465) is equally applicable in the Section 2053 context. And in both cases, a policy of blind adherence to state trial court decrees, regardless of whether they are adversarial or correctly implement state law, "might jeopardize the

[13] Indeed, even under the approach of two of the three dissenters in *Estate of Bosch*, the Surrogate's decree here is not binding for federal estate tax purposes. Justice Harlan, joined by Justice Fortas, dissented on the ground that the majority's position "require[d] federal intervention into the administration of state law far more frequently than the federal interests here demand" (387 U.S. at 480). Justices Harlan and Fortas also rejected the taxpayers' position that a state court decree should bind the federal court, however, stating that this approach "would create excessive risks that federal taxation will be evaded through the acquisition of inadequately considered judgments from lower state courts" (*ibid.*). The rule proposed by these dissenting Justices was that "federal courts must attribute conclusiveness to the judgment of a state court, of whatever level in the state procedural system, unless the litigation from which the judgment resulted does not bear the indicia of a genuinely adversary proceeding" (*id.* at 481). See also *id.* at 483-484 (Fortas, J., dissenting). Thus, although the district court relied upon Justice Harlan's opinion in *Estate of Bosch* (see J.A. A57), it is apparent that the Surrogate's approval of petitioner's attorney's fee, entered in an uncontested proceeding without presentation of any record of the services provided, would not have been regarded by Justices Harlan and Fortas as entitled to conclusive effect in federal court.

federal revenue" (387 U.S. at 464). See also *id.* at 478 (Harlan, J., dissenting).[14]

Petitioner's primary objection to the relevance of *Estate of Bosch* is his assertion (Br. 31-34) that the decision is limited to cases involving "a search for the applicable rule of law" (Br. 33). Hence, petitioner argues that the rule of that case applies only where the estate tax issue turns upon a pure question of state law not passed upon by the highest court of the state. If the federal case turns upon an application to a particular set of facts of legal principles that have been settled by the highest court of the state, however, petitioner maintains that *Estate of Bosch* is inapplicable, and the federal court must treat the state court decree as binding for estate tax purposes. That distinction is unsound. The Surrogate's determination to approve an attorney's fee may be factbound and involve an element of discretion, but, for purposes of the federal estate tax provisions, it still must be regarded as a legal judgment as to the reasonableness of the fee under principles of New York law. Otherwise, the limitation of Section 2053 that the administration expense must be "allowable by the laws

[14] Petitioner notes (Br. 30-31) that the Court in *Estate of Bosch* relied in part on the legislative history of Section 2056, which stated that Congress intended that " 'proper regard,' not finality," be given to state court determinations. 387 U.S. at 464 (quoting S. Rep. No. 1013, 80th Cong., 2d Sess. Pt. 2, at 4 (1948)). But there is no reason to think that Congress intended a different standard under Section 2053, where the language of the statute directs an inquiry into state law. Indeed, the longstanding regulations under Section 2053 essentially establish a "proper regard" standard for state court decrees in that they provide that such a decree "will ordinarily be accepted if the court passes upon the facts upon which deductibility depends" and they establish a presumption that the court actually passed on the merits "in all cases of an active and genuine contest" (Treas. Reg. § 20.2053-1(b)(2)).

of the jurisdiction" would not come into play at all.[15] When an issue of state law must be determined for estate tax purposes, *Estate of Bosch* teaches that the federal court should make an inquiry into what the highest court in the state would have held, not blindly accept a trial court's determination; that approach should apply whether the question of law is abstract or factbound.

Petitioner's proffered distinction finds no support in the *Estate of Bosch* decision itself. There was no indication in either of the court of appeals' decisions in the two estate tax cases decided by this Court in *Estate of Bosch* or in this Court's opinion, that the highest state court had not decided the applicable rule of law in those cases. See *Commissioner* v. *Estate of Bosch,* 363 F.2d 1009 (2d Cir. 1966), rev'd, 387 U.S. 456 (1967) (validity of release of general power of appointment); *Second Nat'l Bank* v. *United States,* 351 F.2d 489 (2d Cir. 1965), aff'd, 387 U.S. 456 (1967) (whether decedent's will negated the application of the state proration statute). Indeed, the issue in *Second Nat'l Bank* — whether the testator intended to negate proration — was inherently factual, and the court of appeals' detailed discussion of the issue indicates that the trial court's decision was quite factbound, not an exposition of an abstract rule of law. See 351 F.2d at 492-494. Thus, the factual context of *Estate of Bosch* itself indicates that its rule is applicable to trial court decrees that apply settled law to a particular set of facts, as well as to trial court decisions that purport to state a general legal principle that has not been adopted by the state's highest court.[16] And that

[15] Section 2053 in no way suggests that the government (and, consequently, the federal court) should be bound by factual determinations in a state proceeding in which it was not a party, contrary to normal principles of collateral estoppel.

[16] Indeed, Justice Harlan, in his dissent in *Estate of Bosch,* understood the Court's decision "to require federal courts to examine

understanding of *Estate of Bosch* is reflected in the lower courts, which have applied it in cases where the state trial court's decision simply applies settled law to a particular fact situation. See, *e.g., Estate of Kraus* v. *Commissioner,* No. 88-2365 (7th Cir. May 22, 1989), slip op. 6-8 (whether facts demonstrated "mistake" that would justify reformation of trust); *Magavern* v. *United States,* 550 F.2d 797, 801-802 (2d Cir.) (construction of trust instrument), cert. denied, 434 U.S. 826 (1977). The process of applying a legal principle to various factual circumstances is, under our common law tradition of case-by-case adjudication, the process of delineating and refining that legal principle itself.

Petitioner also suggests (Br. 35-38) that, in any event, *Estate of Bosch* should not apply to attorney's fee awards by the New York Surrogate's Court because the highest court of the state, the New York Court of Appeals, does not review such awards. This suggestion is misguided. It is clear that fees awarded by the Surrogate are subject to appellate review. The New York intermediate appellate court — the Appellate Division — routinely reviews fees awarded by the Surrogate. See, *e.g., In re Freeman,* 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 (1974), aff'g 40 A.D. 2d 397, 398, 341 N.Y.S.2d, 511, 513-514 (4th Dep't 1973); *In re Brehm,* 37 A.D. 2d 95, 97, 322 N.Y.S.2d 287, 290 (4th Dep't 1973) (rejecting Surrogate's reduction of claimed fee). And it is not uncommon for the Appellate Division to find that the fee awarded by the Surrogate is excessive and, accordingly, order its reduction. See, *e.g., In re Cohen,* 120 A.D. 2d 585, 501 N.Y.S.2d 1015 (2d Dep't 1986); *In re Gil,* 67 A.D. 2d 779, 780, 412 N.Y.S.2d

for themselves, absent a judgment by the State's highest court, the content *in each case* of the pertinent state law" (387 U.S. at 479 (emphasis added)). See also *id.* at 480.

682, 684 (3d Dep't 1979); *In re Estate of Roth*, 29 A.D. 2d 941, 289 N.Y.S. 2d 575 (1st Dep't 1968); *In re Gasco*, 27 A.D. 2d 557, 275 N.Y.S. 2d 871 (2d Dep't 1966). Thus, it is clear that a Surrogate's award of attorney's fees is not necessarily "the best available authority on whether particular expenses are 'allowable' under New York law" (Pet. Br. 38), and it does not represent a conclusive declaration of state law that would be binding on a federal court under *Estate of Bosch*.[17]

3. *Policy Considerations Counsel Against a Rule Making a Surrogate's Approval of Attorney's Fees Binding on the Federal Courts in Estate Tax Litigation*

a. Acceptance of petitioner's contention that a Surrogate's Court decree is conclusive of the deductibility of claimed administration expenses under Section 2053(a) of the Code would have deleterious effects on the federal revenue and on the fair administration of the estate tax. The drawbacks of blind adherence to state trial court decrees that are not the product of adversarial litigation were well stated by Justice Harlan in his dissent in *Estate of Bosch* (387 U.S. at 478):

> It can scarcely be doubted that if conclusiveness for federal tax purposes were attributed to any lower state court decree, whether the product of genuinely adversary litigation or not, there would be many occasions on which taxpayers might readily obtain favorable, but entirely inaccurate, determinations of state law from unsuspecting state courts. One need not, to envision this hazard, assume either fraud by the parties or any lack of competence or disinterestedness among state judges; no more would be needed than a complex issue of law, a crowded calendar, and the presentation to a busy judge of but essentially a single viewpoint. The consequences of any such occurrence would be an explication of state law that would not necessarily be either a reasoned adjudication of the issues or a consistent application of the rules adopted by the State's appellate courts.

And, as Justice Harlan proceeded to explain, these problems are not outweighed by any countervailing considerations (*id.* at 478-479):

> It is difficult to suppose that adherence by federal courts to such judgments would contribute materially to the uniformity of the administration of state law, or that the taxpayer would be unfairly treated if he were obliged to act, for purposes of federal taxation, as if he were governed by a more accurate statement of the requirements of state law. Certainly it would contribute nothing to the uniformity or accuracy of the administration of the federal revenue statutes if federal courts were compelled to adhere in all cases to such judgments.

The subject of the IRS investigation in this case well illustrates the drawbacks of a rule requiring the federal courts invariably to accept the determination of a state trial court to allow particular administration expenses. The IRS's concern over the claimed deduction in this case was triggered in part by the dual role played by petitioner

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[17] In fact, petitioner's assertion (Br. 35-36) that "the Surrogate's discretionary fee allowance can *never* be reviewed by the New York Court of Appeals" is not correct. See N.Y. Const. art. VI, § 3(b)(1). Even if it were correct, however, the most that could be argued is that in applying *Estate of Bosch* to attorney's fee awards in New York, the Appellate Division should be regarded as the "highest court of the state" for those limited purposes. But that argument has no relevance here. Whether the Surrogate Court's decision is reviewable on appeal only by the Appellate Division, or also by the New York Court of Appeals, it is clear that its decree is that of a state trial court subject to appellate review, which is not binding on a federal court.

as attorney and executor. This practice has been the subject of considerable recent criticism, in part because it presents the opportunity for the attorney to collect twice for the same services.[18] And service as both attorney and executor has been subjected to particular media scrutiny recently in Monroe County, New York, where the instant case arose, because of concern that some estate attorneys' fees in that locality have been excessive.[19]

While service as both attorney and executor is legal in New York, double recovery of fees for the same work is not. Under New York law, an attorney's fee should be compensation for legal services. An attorney is not entitled to compensation for activities that are executorial in nature. See *In re Gates*, 120 A.D. 2d 890, 892, 503 N.Y.S.2d 161,

[18] See Groppe, *The "New" Putnam Rule: Problems Facing the Attorney/Legatee/Fiduciary*, 61 N.Y. St. B.J. 18, 24-27 (1989); deFuria, *A Matter of Ethics Ignored: The Attorney-Draftsman as Testamentary Fiduciary*, 36 U. Kan. L. Rev. 275, 304-308 (1988); Gentle, *Lawyers as Executors and Trustees: Snakes and Ladders*, 36 Ala. Law. 94 (Mar. 1987); Johnston, *An Ethical Analysis of Common Estate Planning Practices – Is Good Business Bad Ethics?*, 45 Ohio St. L.J. 57 (1984); Fanning, *Fee-busting*, Forbes, Sept. 7, 1987, at 64. Indeed, Judge Michael Telesca, the federal district judge who decided this case and who formerly served as Monroe County Surrogate, has recommended to the New York State Law Revision Commission that New York law be amended to prohibit one person from serving as both attorney and executor for an estate. See Dougherty, *Double-Dipping: Legal but Unjust*, Rochester Democrat and Chron., Oct. 4, 1987, at 15A, col. 1.

[19] See Stinson, *Monroe Estate Handling Faulted*, Rochester Democrat and Chron., Apr. 7, 1988, at 1B, col. 2; Dougherty, *Court Publicly Rebukes Rochester Lawyer*, Rochester Democrat and Chron., Mar. 5, 1988, at 6B, col. 1; Dougherty, *Double-dipping: Legal but Unjust*, Rochester Democrat and Chron., Oct. 4, 1987, at 15A, col. 1; Dougherty, *Double Trouble in Staid World of Estate Lawyers*, Rochester Democrat and Chron., Aug. 9, 1987, at 1A, col. 4.

163 (3d Dep't 1986); *In re Hallock*, 214 A.D. 323, 324, 212 N.Y.S. 82, 86 (3d Dep't 1925).[20] Thus, fees claimed by an attorney for services that he performed in his capacity as executor (and for which he was also compensated) are not "allowable" under New York law and should not be approved. See *In re Estate of Stalbe*, 130 Misc. 2d 725, 497 N.Y.S.2d 237 (Surr. Ct. Queens County 1985); *In re Estate of Breunig*, N.Y.L.J., June 17, 1986, at 15, col. 2 (Surr. Ct. Suffolk County 1986); *In re Estate of Orza*, N.Y.L.J., Sept. 18, 1981, at 6, col. 5 (Surr. Ct. New York County 1981); see also *In re Estate of Hertz*, 128 A.D. 2d 780, 512 N.Y.S.2d 1015 (2d Dep't 1987) (where attorney performed executorial services, fee to be paid by executor out of his own commission).

The possibility that an individual who serves as both attorney and executor is impermissibly claiming attorney's fees for executorial services can be eliminated by appropriate scrutiny of a fee request – specifically, of the services for which the fee is claimed. But there is no evidence of such scrutiny here. The fee request was uncontested, and the Surrogate had only the executor's final accounting and the estate tax returns before him in passing on the fee; petitioner did not furnish a statement of the services covered by the fee.[21]

[20] See also *In re Lieberman's Estate*, 151 N.Y.S.2d 166 (Surr. Ct. Westchester County 1956); *In re Free's Will*, 4 Misc. 2d 463, 148 N.Y.S.2d 884 (Surr. Ct. Westchester County 1956); *In re Scher's Estate*, 147 Misc. 791, 264 N.Y.S. 579 (Surr. Ct. Westchester County 1933); *In re Owen's Estate*, 144 Misc. 688, 259 N.Y.S. 892 (Surr. Ct. Richmond County 1932).

[21] Approval of the fee on such a sparse record would not be permitted today in New York. Section 207.45(a) of the Uniform Rules for New York State Surrogate's Courts now provides that, in any proceeding for the determination of an attorney's compensation, there shall be filed an affidavit of services stating in detail the services rendered, the time spent, and the method or basis by which the requested compensation was determined. See also Section 207.59 (requiring accounting).

Moreover, in contrast to some other jurisdictions that have imposed rules that assure greater scrutiny of individuals serving in a dual capacity,[22] the practice in Monroe County generally has been not to engage in close scrutiny of such fee applications. The chairman of the New York Bar Association's Trust and Estate Laws Section has been quoted as recognizing that "[t]he practice in Monroe County is a little more liberal than, say, in other parts of the state." Dougherty, *Double Trouble in Staid World of Estate Lawyers,* Rochester Democrat and Chron., Aug. 9, 1987, at 1A, col. 4. And the Monroe County Surrogate who approved petitioner's fee noted that he has not ordinarily required an accounting of fees by attorney-executors because he's "confronted with manpower problems in Rochester." Dougherty, *Lawyers and IRS Square Off over Payments from Estates,* Rochester Democrat and Chron., Oct. 4, 1987, at 15A, col. 2. The Surrogate also acknowledged that uncontested fee applications are not carefully examined (*ibid.*): "I'll tell you quite frankly, we don't go over those with a fine-tooth comb. So that if it doesn't stick out like a real punch in the face, we

[22] The New York State Surrogate's Court located in Queens County adopted a rule requiring a fiduciary who is also an attorney to file an accounting within one year of his appointment. The Surrogate there noted that this rule "was prompted by the numerous complaints over the years involving the nomination and performance after appointment of attorneys as fiduciaries of estates." *In re Estate of Stalbe,* 130 Misc. 2d at 726, 497 N.Y.S.2d at 239. The Surrogate further stated (*ibid.*): "In the experience of this Court, the vast majority of estates are settled informally by Receipt and Release with no judicial review of the fairness of the fees charged. In this fashion, the carefully crafted statutory safeguards are, practically speaking[,] ignored." See also Groppe, *The "New" Putnam Rule: Problems Facing the Attorney/Legatee/Fiduciary,* 61 N.Y. St. B.J. 18, 27 (1989); *In re Moore,* 139 Misc. 2d 26, 28, 526 N.Y.S.2d 377, 379 (Surr. Ct. Bronx County 1988).

do not get after them." See also Stinson, *Monroe Estate Handling Faulted,* Rochester Democrat and Chron., Apr. 7, 1988, at 1B, col. 2 (Monroe County fees are higher because administration is overburdened).[23]

In these circumstances, it is manifest that the IRS's responsibility to the public fisc would be undermined if it were not permitted even to investigate the basis for fees claimed as an administration expense deduction on a federal estate tax return. The IRS has a duty to collect the estate tax that is properly due, and the federal courts have a duty not to allow deductions that are not permitted by the Code. These duties cannot appropriately be discharged if a federal court—and hence the IRS—is invariably required to accept as binding the approval of a claimed fee by a Surrogate Court. Given that the New York appellate courts sometimes reduce fees that have been approved by the Surrogate after an adversary proceeding (see pp. 35-36, *supra*), it follows a fortiori that the IRS must be permitted to inquire into the basis for a fee entered in an uncontested proceeding on a record that does not disclose the services for which the fee is claimed.

[23] The amount of the attorney's fee in this case also gave rise to some concern that the Surrogate had not determined that it was based entirely on services not the responsibility of the executor. As an example of the "liberal[ity]" of practice in Monroe County, the chairman of the New York Bar Association's Trust and Estate Laws Section noted his impression that, "in Monroe County, they (judges) will go pretty much up to what an executor (fee) will be." Dougherty, *Double Trouble in Staid World of Estate Lawyers,* Rochester Democrat and Chron., Aug. 9, 1987, at 1A, col. 7. New York law, of course, requires that an attorney's fee be based on the services rendered, not computed as a percentage of the value of the estate like the executor's commission. Here, the approved executor's commission, computed on a percentage basis, was $17,548. The approved attorney's fee was $16,800, and the Surrogate stated, without explanation, that he would have approved up to $17,500 (see J.A. A32).

b. Petitioner contends (Br. 18-24) that policy considerations support a rule that accords conclusive effect to the Surrogate's approval of an attorney's fee. The thrust of petitioner's argument is that any inquiry by the federal courts into the correct rule of state law "would irresistibly tempt the IRS to substitute its own uniform standard[,] * * * a *de facto* federal rule of attorneys' fees" (Pet. Br. 19). This objection is baseless. As petitioner necessarily acknowledges (see Br. 17), the federal courts are frequently called upon to resort to state law for the governing rule of decision, and they can do so in this context as well. The IRS surely should not be prevented from even investigating the grounds for a claimed deduction on the basis of an assumption that the federal courts and the IRS will not apply Section 2053 according to its terms.[24]

[24] Petitioner (see Br. 6, 14, 19) repeatedly accuses the IRS of seeking to apply a uniform federal standard of reasonableness to the deductibility of attorney's fees. There is no basis for this accusation. First, this is merely a summons enforcement proceeding, which presents no occasion for consideration of the standard of review to be applied with respect to the merits of the deduction. In any event, the government in the court of appeals explicitly eschewed any intention to apply a uniform federal standard (see, *e.g.*, C.A. Reply Br. 12). Indeed, from the beginning of this controversy, respondent Serling's requests for information from petitioner cited the New York Court of Appeals decision in *In re Freeman, supra*, as the framework for IRS investigation of the validity of the deduction. See J.A. A32-A33.

Most of the authority cited by petitioner (Br. 27-28) and amici (Br. 14-16) on this point pertains to Treas. Reg. § 20.2053-3(a), which provides that "administration expenses" under the statute must be for the benefit of the estate, rather than the benefit of the beneficiaries. This regulation, which arguably establishes a federal standard for determining what types of expenses are encompassed by Section 2053, is addressed to a question not implicated here—*viz.*, whether the expenses in question are, in fact, expenses of administering the estate. See *Estate of Smith* v. *Commissioner*, 510 F.2d at 482-483; see also

Petitioner also mistakenly asserts (Br. 21-24) that the IRS and the federal courts are incapable of applying New York law, stating that some of the relevant factors are intangible and that there is, as a result, no single "correct" attorney's fee. That there is a range of fees that would meet New York standards of reasonableness in a given case, and hence be "allowable" under New York law, should not disable the IRS and the federal courts from investigating the basis for the claimed fee. It remains within the competence of a federal court to determine whether the fee falls within that permissible range or, alternatively, whether the fee cannot possibly be justified regardless of the peculiarities of local practice with which the local probate judge is more intimately familiar.[25] Petitioner's asser-

Pitner v. *United States*, 388 F.2d 651, 659 (5th Cir. 1967) (suggesting possibility of federal standard where state law "fails in adequately representing the interest of the federal government").

By the same token, there is no merit to petitioner's charge (Br. 19) that the IRS intends to apply a "timesheet-and-hourly-rate approach to attorneys' fees" in defiance of state law. It is true, of course, that time records were among the records requested by the summons, but those records are manifestly relevant under state law to consideration of the reasonableness of a claimed fee. The first of the factors listed in *In re Freeman* is "time and labor required." See 34 N.Y. 2d at 9, 311 N.E.2d at 484, 355 N.Y.S.2d at 341.

[25] Nor is there any reason to believe that it will be "commonplace" (see Pet. Br. 21) for federal courts to second-guess Surrogate's fee awards to the detriment of the estate, thus leading to "an explosion of penny-ante litigation" (Pet. Br. 43). As long as it appears that the Surrogate has duly considered the relevant facts and not committed some egregious error, there is no reason to expect that federal district courts would often conclude—or would often be asked by the IRS to conclude—that the fee awarded by the Surrogate is not allowable under state law. Indeed, although some additional docketed cases are presently pending, we are aware of only three reported cases in which the IRS has challenged a claimed deduction for administration expenses on the ground that the attorney's fee was excessive. See *Estate*

tion (Br. 24) that "Congress could not have intended" that the validity of an estate tax deduction would be determined by a federal court cannot be squared with either the terms of the statute or with the fundamental policies underlying enforcement of the federal tax laws.

Finally, there is no merit to petitioner's contention (Br. 40-44) that a failure to give conclusive effect to the Surrogate's approval of an attorney's fee "violat[es] principles of federalism." The IRS's investigation and the possible review by a federal court of the basis for petitioner's fee are directed solely at the determination of the estate's federal tax liability. Those federal proceedings have no effect on the administration of estates under the state probate system, and, even if the federal court were to determine that the fee was not allowable under state law, that would not affect the Surrogate's order.

Petitioner cites *Younger* v. *Harris*, 401 U.S. 37 (1971), and subsequent abstention cases to support his contention that the federal courts should treat the Surrogate's approval of attorneys' fees as binding for federal estate tax purposes. Plainly, the abstention doctrine has no bearing here. This case does not even involve concurrent state and

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of DeWitt v. *Commissioner*, 54 T.C.M. (CCH) 759 (1987); *Bank of Nevada* v. *United States, supra*; *First National Bank* v. *United States, supra*.

Petitioner's citation of his own refund action in this connection is unpersuasive since that litigation is a direct consequence of petitioner's refusal to comply with the summonses. Because the IRS was unable to investigate the basis for petitioner's fee before the expiration of the three-year statute of limitations on assessments (I.R.C. § 6501), it was forced to issue a notice of deficiency on incomplete information disallowing the entire claimed attorney's fee; petitioner then challenged that determination by filing a refund suit in district court. Had petitioner instead complied with the summons, the IRS's investigation might have resulted in a determination of no deficiency.

federal proceedings addressed to the same issue; moreover, it bears no resemblance to the special situations in which abstention has been regarded as appropriate (see, *e.g.*, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814-817 (1976)). Contrary to petitioner's suggestion, however, the principles of comity and federalism reflected in abstention doctrine are fully vindicated by the approach of the court of appeals. Section 2053 of the Code, in associating the deductibility of administration expenses with their allowability under state law, and Treas. Reg. § 20.2053-1(b)(2), in stating that a state trial court's decree "will ordinarily be accepted if the court passes upon the facts upon which deductibility depends," both demonstrate "sensitivity to the legitimate interests of both State and National Governments" (*Younger* v. *Harris*, 401 U.S. at 44). But that sensitivity does not require federal authorities to forgo their responsibilities to collect federal tax revenues, in favor of blind adherence in federal tax proceedings to the determination of a state trial court, no matter how misguided. Rather, the rule adopted by Congress in Section 2053 – requiring the federal courts to apply state law with proper regard for state trial court determinations – is appropriately designed to "be fair to the taxpayer and protect the federal revenue as well" (*Commissioner* v. *Estate of Bosch*, 387 U.S. at 465).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

Section 2053. ***Expenses, Indebtedness, and Taxes.***

(a) ***General Rule***

For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

* * * * *

Section 7602. ***Examination of books and witnesses***

(a) ***Authority to Summon, Etc.***

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and placed named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * * *

The Treasury Regulations on Estate Tax (1954 Code) provide in pertinent part:

Section 20.2053-1. ***Deductions for expenses, indebtedness, and taxes; in general***

(a) *General rule.* In determining the taxable estate of a decedent who was a citizen or resident of the United States at the time of his death, there are allowed as deductions under section 2053(a) and (b) amounts falling within the following two categories (subject to the limitations contained in this section and in §§ 2053-2 through 20.2053-9):

(1) *First category.* Amounts which are payable out of property subject to claims and which are allowable by the law of the jurisdiction, whether within or without the United States, under which the estate is being administered for—

(i) Funeral expenses;

(ii) Administration expenses;

(iii) Claims against the estate (including taxes to the extent set forth in § 20.2053-6 and charitable pledges to the extent set forth in § 20.2053-5); and

(iv) Unpaid mortgages on, or any indebtedness in respect of, property, the value of the decedent's interest in which is included in the value of the gross estate undiminished by the mortgage or indebtedness. As used in this subparagraph, the phrase "allowable by the law of the jurisdiction" means allowable by the law governing the administration of decedents' estates. The phrase has no reference to amounts allowable as deductions under a law which imposes a State death tax. See further § 20.2053-2 through 20.2053-7.

(2) *Second category.* Amounts representing expenses incurred in administering property which is included in the gross estate but which is not subject to claims and which—

(i) Would be allowable as deductions in the first category if the property being administered were subject to claims; and

(ii) Were paid before the expiration of the period of limitation for assessment provided in Section 6501. See further § 20.2053-8.

(b) *Provisions applicable to both categories.*

(1) *In general.* If the item is not one of those described in paragraph (a) of this section, it is not deductible merely because payment is allowed by the local law. If the amount which may be expended for the particular purpose is limited by the local law, no deduction in excess of that limitation is permissible.

(2) *Effect of court decree.* The decision of a local court as to the amount and allowability under local

law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed. For example, if the question before the court is whether a claim should be allowed, the decree allowing it will ordinarily be accepted as establishing the validity and amount of the claim. However, the decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may be rebutted by proof to the contrary. If the decree was rendered by contest, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant. The decree will not be accepted if it is at variance with the law of the State, as, for example, an allowance made to an executor in excess of that prescribed by statute. On the other hand, a deduction for the amount of a bona fide indebtedness of the decedent, or of a reasonable expense of administration, will not be denied because no court decree has been entered if the amount would be allowable under local law.

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REPLY BRIEF

(9)

No. 88-928

In The Supreme Court of the United States

OCTOBER TERM, 1989

JAMES M. WHITE, AS ATTORNEY FOR AND AS THE EXECUTOR OF THE ESTATE OF HELEN P. SMITH, DECEASED,

Petitioner,

vs.

UNITED STATES OF AMERICA AND JAMES M. SERLING, ESTATE TAX ATTORNEY, INTERNAL REVENUE SERVICE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED DECEMBER 2, 1988
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JAMES M. WHITE, as attorney for and as the Executor of the Estate of Helen P. Smith, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA and JAMES M. SERLING, Estate Tax Attorney, Internal Revenue Service,

Respondents

On Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

REPLY BRIEF FOR PETITIONER

Preliminary Statement

This Brief is submitted on behalf of petitioner James M. White in reply to the Brief for the respondents, the United States of America (herein "the Service") and James M. Serling, dated June, 1989.

A prevailing characteristic of the respondents' Brief is the Service's penchant for saying what it does not mean and meaning what it does not say. Moreover, in several respects the Service's posture has altered as this case has passed through the appellate

courts. This Brief responds to several significant aspects of the Service's elusive, evolving position. It also addresses the interpretation and applicability of the Treasury Regulations under I.R.C. Section 2053, which are discussed in the respondents' Brief.

ARGUMENT

A. *Notwithstanding its denials, the Service's position tends inexorably and impermissibly toward a federal standard of reasonable attorneys' fees*

The Service apparently now recognizes that an explicit argument in favor of federal standards for deductibility of attorneys' fees would be unsupportable under the language of I.R.C. Section 2053. It has abandoned the position it took in the district court[1] and denies that it intends to apply a federal standard of "reasonableness" in evaluating attorneys' fees.

But its posture in this case belies its disclaimer. In criticizing the way the Monroe County Surrogate's Court reviews fee applications, the Service shows that it is unwilling to accept and apply the guidelines for attorneys' fees under New York's controlling precedent, *Estate of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974). What the Service would employ instead amounts to an impermissible federal standard.

First, the Service complains that fee awards in Monroe County are notoriously higher than in other parts of New York State. To the Service, this alleged circumstance suggests that the Monroe County Surrogate's Court is not complying with New York law and that its auditors must trim deductions for fees that seem to them excessive.

[1] As discussed by District Judge Telesca in his decision (A-52), the Service argued in his court, citing *Pitner v. United States*, 388 F.2d 651, 659 (5th Cir. 1967), that the issue of "reasonableness" of administrative expenses *was* a federal question.

The point that the Service evades is that, under *Freeman*, community custom and practice regarding attorneys' fees is one of the factors *explicitly relevant* to a fee award. 34 N.Y.2d at 5-6, 9, 355 N.Y.S.2d at 337-38, 341. Far from requiring that Surrogate's Courts in Rochester, Watertown, and Brooklyn render identical awards for similar work, New York law requires that fee awards take local practice into account. *Id.* Thus, in the present case, Surrogate Ciaccio advised "that the fee set is in keeping with our ordinary and customary guidelines which have been followed in this Court for several years," noting also that his court had a practice of "keep[ing] the fees for attorney-executors below a full commission." J.A. 38.

Its audit practices show that the Service disapproves of a system that confers principal responsibility both for defining and implementing "community custom and practice" regarding estate attorneys' fees upon the duly elected Monroe County Surrogate. But it is New York law that confers these prerogatives on the Surrogate, and under section 2053 the Service is not free to legislate something different. Higher fees in Monroe County, if that is what they are,[2] merely reflect local practice, with which the Service has, under *Freeman* and I.R.C. Section 2053, no legitimate grievance.

If permitted to independently determine what counsel fees "should" be, therefore, the Service obviously intends to apply a modified formulation of New York law that minimizes or eliminates the element of local custom. In other words, the Service intends to substitute a federal standard.

[2] In fact, there are no facts or statistics in the record to support the Service's assertion that fees in Monroe County are generally higher than in other parts of New York State.

Second, the Service implies that the Surrogate's fee award is suspect because, without attorney time records and hourly rates, the court did not have enough information to properly evaluate petitioner White's fee application. The Service itself does not propose to make the same alleged error; the principal focus of the summonses in dispute in this case was on White's timesheets.

The Service defends this emphasis by arguing in its Brief (p. 43, n.24) that time records are "manifestly relevant" under state law; after all, "time and labor required" is one of the *Freeman* factors. The attraction of this contention is deceptive. There is a world of difference between "time and labor required" and "time and labor actually expended", as can be seen whenever a young lawyer spends twelve hours drafting a probate petition that an experienced practitioner could complete in two.

Under New York law, time actually expended, as reflected in itemized time records, is of little or no significance.

> The value of an attorney's services cannot be limited to "specified and detailed bills of particulars with a specified amount for each item, as in the case of goods sold, or mere manual services rendered."
>
> . . . .
>
> The standard by which the value of such services is measured is, however, the fair and reasonable value of the services rendered after considering the various elements referred to. I do not think items as to *time actually employed* in work on the case are of much importance. It is the ability of the attorney and his capacity and success in handling large and important matters and in commanding large fees therefor, the amount involved, and the result obtained, which are of prime importance in determining what constitutes a just and reasonable charge.

In re Potts, 213 A.D. 59, 62, 209 N.Y.S. 655, 657-58 (4th Dep't), *aff'd*, 241 N.Y. 593 (1925) (emphasis supplied) (cited and principally relied on in *Estate of Freeman*, 34 N.Y.2d 1, 9, 355

N.Y.S.2d 336, 341 (1974)). Indeed, in *Freeman* itself the New York Court of Appeals rejected arguments that a Surrogate, in fixing an attorney's fee, should rely primarily on evidence as to services performed. *See* 34 N.Y.2d at 2 (reporter's summary of arguments of counsel).[3]

The Service's infatuation with attorney time records reflects the practical difficulty faced by IRS auditors who are, for want of expertise, not equipped to judge what legal work is actually "required" on a given estate. An experienced judge like the Monroe County Surrogate can tell merely by reviewing the papers filed in his court what a lawyer needed to do to settle an estate, just as an experienced appellate judge reading a brief can tell how much research, analysis, and attention went into its preparation. The probate file speaks for itself.[4]

The Respondent's Brief emphasizes repeatedly that White was both executor and attorney for the Smith estate, as if that circumstance cast a cloud on his actions. But the Surrogate did not need itemized time records to distinguish between what petitioner White did in his capacity as executor, for which he received the

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[3] That is not to say, of course, that an attorney's records of time actually spent on particular aspects of a matter would not have some relation to the legal services actually needed. In most cases they would, and, in fact, detailed affidavits of services *are* often submitted in support of fee applications by lawyers in Monroe County and elsewhere in New York State. Petitioner's contention is not that time records would be irrelevant to a determination of a reasonable fee, but that the Internal Revenue Service has no business making that determination.

[4] A court is an "expert" on the reasonable and proper attorneys' fees and, like an expert witness, can form a judgment as to the value of legal services from its own knowledge and experience. *Campbell v. Green*, 112 F.2d 143, 144 (5th Cir. 1940). Moreover, as noted in petitioner's principal Brief, the federal courts have recognized the obvious fact that a court's "familiarity with the amount and quality of work performed" by an attorney "enormously facilitates rapid disposition" of fee disputes and supplies an appropriate basis for federal courts to take ancillary jurisdiction of such matters. *Cluett, Peabody & Co. v. CPC Acquisition Co.*, 863 F.2d 251, 256 (2d Cir. 1988).

statutorily prescribed compensation,[5] and what he did in his capacity as attorney. The Surrogate knew where one role ends and the other begins, and he was also aware that in general an attorney who serves in both capacities may not require as large an attorney's fee as would otherwise be the case. J.A. 38.

Obviously an attorney's fee should not reflect services performed as an executor, and it might well happen that a lawyer who serves in both capacities would record his activities as executor on the same timesheet as his services as an attorney. But since the Surrogate did not rely on White's timesheets in the first place, but on the estate file and White's accounting (J.A. 38-39), the fee award obviously did *not* reflect services as executor.

Third, the Service misleadingly asserts that New York law forbids computation of an attorney's fee as a percentage of the value of the estate like the executor's commission. Respondents' Brief, p. 41, n.23. The New York Court of Appeals stated in *Freeman* that while it might be improper for a court to rely exclusively on a bar association fee schedule (i.e., a percentage formula) to approve a fee, such a schedule *could* "be used to determine the customary fee in the community . . . if it reflects an existing practice." 34 N.Y.2d at 10, 355 N.Y.S.2d at 341. Indeed, the *Freeman* court approved a fee for work on a "routine" estate that was almost precisely the amount, in percentage terms, that a bar association fee schedule would have yielded. But the Service, preoccupied with time entries and hourly rates, seems unwilling to accept "customary fees" as a legitimate and important component of a fee award.

[5] The Service errs in its Brief (p. 3, n.3) by saying the "[t]he record does not clearly indicate why the amounts claimed as deductions on the estate tax return were slightly smaller than the amounts awarded by the Surrogate." In fact, a complete explanation was given by White in his Response. J.A. 17.

The Service's intolerance for New York law, which confers sole jurisdiction and wide discretion on its Surrogate judges to make subjective judgments, shows that the Service would undoubtedly also find the laws of a jurisdiction like California, where attorneys' fees are actually prescribed as a percentage of the estate (*see* Cal. Probate Code § 91) equally distasteful. In California, however, the Service has no pretext for attacking the system. Counsel fees in New York estates ought not to be subjected to a "second-guess" by the Service, while fees in California estates are not so subjected, merely because the latter are readily calculated by a mechanical formula and not in accordance with the discretion of a local judge. In either case such fees are "allowable by the laws of the jurisdiction" within the meaning of I.R.C. Section 2053 and cannot properly be overridden by a federal standard, which is the result sought by the Service.

B. *The Service should not be heard to claim in this Court for the first time that its audit has any purpose other than de novo review of the amount of the attorney's fee*

In the courts below, the motives of the IRS were not in issue. The Service commenced the proceeding by reiterating blandly in its Petition that the purpose of its summonses was to "shed light on the correctness of the federal tax liability of the Estate of Helen P. Smith." J.A. 3. Bearing in mind his burden under *United States v. Powell*, 379 U.S. 48, 58, 13 L. Ed. 2d 112, 119 (1964), to show that the summons was not issued for a "proper purpose", however, White countered by alleging in his Response that the true purpose of the summonses was to enable the Service to make an independent, *de novo* determination as to the reasonable value of his services, which purpose he alleged was improper

since the Surrogate's Court had already approved the fee. The Service essentially conceded this contention, except that it claimed that such a *de novo* determination was entirely proper.

In fact, the Service has always intended to make an independent determination of the reasonable value of White's services. Respondent Serling candidly explained this purpose in a letter to White that predated the summonses. J.A. 32-35. Nor did the Service conceal its objective in the court below. Arguing that White should be compelled to produce his time records, the Service stated:

> These records will undoubtedly show what duties White performed as executor of and as attorney for the Estate and how much time he spent in each capacity and *would, therefore, throw light on the reasonableness of the deductions taken for attorney's fees* and executor's commissions. Thus, the records are relevant to determining the correctness of the estate tax return.

Brief for the Appellants in the United States Court of Appeals for the Second Circuit, p. 17 (emphasis supplied).

The Service reiterated this central purpose in its Brief in Opposition to the Petition for Certiorari, claiming that the principles of *Commissioner v. Estate of Bosch*, 387 U.S. 456, 18 L. Ed. 2d 886 (1967), indicated that "the IRS and the federal courts — in considering the estate's federal estate tax liability — are entitled to make *an independent assessment* of whether the fees approved by the Surrogate were in fact 'just and reasonable' " (emphasis supplied). Brief for the Respondents in Opposition, p. 8. In short, the Service's true objective has never been disguised.

But the Service has now shifted its ground. For the first time in the history of this case it suggests that investigating the possibility

of "fraud" was one of the purposes of the summonses.[6] It argues that the summonses are therefore enforceable *even if* an independent review of the fee amount is, as White alleges, improper! Respondents' Brief, pp. 20-23. No such contention was made in the lower courts.

Petitioner White does not dispute the Service's right to audit his records to investigate the possibility that he obtained his fee fraudulently. But the fact is that the summons *in this case* never would have been issued but for respondent Serling's expressed intention to conduct his own independent review of petitioner's fee. This case was argued and decided in the courts below on the assumption that the summons in question were issued *only* for that purpose.[7] Its new claim that fraud is also "one of the areas of investigation" (Respondents' Brief, p. 20) represents an inappropriate attempt to obscure the narrowly focused issue which this Court agreed to review.[8]

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[6] It is hard to imagine how an attorney's time records could shed light on the possibility that a decree was obtained by skulduggery. A lawyer who bribes a judge to authorize an excessive fee is unlikely to record the event on his timesheets.

[7] As Judge Telesca wrote in his decision: "It appears that the IRS is claiming the right to second guess the decision of the Surrogate on commissions and attorneys' fees under *any* circumstances." J.A. 54. The Second Circuit Court of Appeals decided this precise issue, albeit adversely to White: "We conclude that, with regard to the federal deductibility of White's fees, the IRS is entitled to make an independent assessment of the validity of White's fees under applicable state law as determined by the state's highest court." J.A. 76.

[8] It was the fact that the audit practice of the Service exemplified by this case had become so routine and mischievous that prompted the active interest of *amicus curiae* from the outset of the enforcement proceeding. See *Amicus Curiae* Brief In Support of Petitioner, p. 18. In raising the specter of fraud by the state probate courts at this late date, and in the context of its routine audit practice, the Service trivializes an otherwise astounding concept and shows the low regard in which it holds these courts.

Implicitly, the Service is arguing that since in theory there are proper reasons for which its summonses *might* have been issued, its summonses should be enforced even though its actual purpose may have been illegitimate. This contention is untenable. Given the broad range of legitimate reasons for an IRS audit, the Service could always, after the fact, conjure up *some* reason why a summons could have been issued in a given case. If the district courts are obligated to overlook improper purposes for a summons wherever a proper purpose can be hypothesized, then good faith on the part of the Service would not be a prerequisite to a summons enforcement action, and an adversary hearing on such an action truly would, contrary to this Court's directive in *Powell*,[9] become a "meaningless" inquiry.

The Service's belated injection of the "possibility of fraud" as an ostensible purpose for its summonses is merely artful. The Service evidently hopes to induce this Court not to decide whether it is "proper" for the IRS to seek information to enable it to make an independent determination of the reasonable value of attorneys' fees. But on the present record, that issue is squarely framed. The Service should be bound by the position it took in the proceedings below, and this case should be decided on its merits.

C. *The IRS position cannot be justified in policy or in practice*

In its brief, the Service piously maintains that *de novo* review of estate attorneys' fees is justified by "the IRS's responsibility to the public fisc." Respondents' Brief, p. 41. This purported concern for revenues does not withstand examination. Assuming hypothetically that White's attorney's fee was $2,500 smaller, the Smith estate would be entitled to deduct $2,500 less, and the IRS would collect tax accordingly. But the Service's arguments overlook the reciprocal relationship between the estate deduction for attorneys' fees and payment of income tax on fees. If the amount of an attorney's fee is not taxed as it passes out of the estate, it will be taxed to the attorney — usually, as the Court will appreciate, at a higher rate. The revenues suffer only if the attorney's income tax bracket is lower than the applicable estate tax rate.

[9] 379 U.S. at 58, 13 L. Ed. 2d at 119-20.

This reciprocal relationship between deductions to estates and taxable income to attorneys does not necessarily exist with respect to other claims against estates. If, for example, an estate seeks a deduction for paying a debt which it did not owe, the loss to the Treasury will probably not be offset by tax on the creditor. In the case of attorneys' fees, however, the government has no genuine financial stake in the matter at all.

What *is* the Service's interest? The Second Circuit Court of Appeals was not sure, stating "that one may well wonder whether the IRS in the Buffalo area is allocating wisely the time and effort of its limited staff." J.A. 85. Perhaps it is merely a matter of idle hands at the IRS's estate tax division. As a result of full implementation of the Economic Recovery Tax Act of 1981 ("ERTA"), the number of taxable estates has declined drastically. The unified gift and estate tax credit now shields estates under $600,000 from any federal estate tax in lieu of prior provisions allowing a mere $60,000 exemption. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 401(a), 95 Stat. 172, 299 (1981) (codified as amended at 26 U.S.C. §§ 2010(a), 6018(a) (1989)). The amendment to provide for an unlimited marital deduction further significantly reduced the number of taxable estates by effectively providing that only one of the spouses of estates is taxed. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(a), 95 Stat. 172, 301 (1981) (codified at 26 U.S.C. §§ 2056(a) (1989)). Not surprisingly, IRS statistics show that the number of federal estate tax returns filed decreased from 225,827 in 1975 to 57,165

in 1987.[10] And it is not simply that IRS estate tax auditors have fewer returns to examine; the further amendment to permit the marital deduction at the election of the executor in "Q-tip"[11] trusts eliminated most issues relating to the qualification for the marital deduction in interspousal bequests. This case, and the "routine practice" it reflects,[12] may well have arisen because the Service's estate tax division had little else to do.

Or perhaps the Service is merely misdirecting its focus from matters of genuine import to matters that should be none of its concern. In a similar case, a Nevada district judge commented:

> Surely the Internal Revenue Service of the United States has a multitude of incidents of deliberate tax evasion to engage the attention of its employees. The dispute here seems patently to be an effort to use the tax laws to control the payment of legal fees in an estate proceeding and to clutter up the courts with unnecessary and burdensome litigation.

First National Bank of Nevada v. United States, 77-2 U.S. Tax Cas. (CCH) ¶ 13,207, 88,635, at 88,636 (D. Nev. 1977).

In the same way, the section in the Service's Brief in this Court on "policy considerations" shows that its Buffalo office disapproves of certain provisions of the New York estate statutes and the way they are applied in Western New York. In particular, the Service does not approve of New York Surrogate's Court Procedure Act Section 2307, which permits an attorney to serve as both executor and attorney for the same estate and to be paid in both

[10] Department of the Treasury, Internal Revenue Service, SOI Bulletin, Winter 1987-88, Vol. 7, No. 3, p. 200, Table 20, "Selected Returns and Forms Filed or to be Filed During Selected Calendar Years 1970-1988".

[11] "Q-tip", or "qualified terminable interest property", is an acronym commonly used by estate practitioners to refer to one form of disposition to a surviving spouse which qualifies for the unlimited marital deduction. The "Q-tip" provision is codified at 26 U.S.C. § 2056(b)(7) (1989).

[12] See *Amicus Curiae* Brief In Support of Petitioner, p. 18.

capacities. Respondents' Brief, pp. 37-39. The Service also evidently thinks that probate courts in western New York are not scrutinizing fee applications closely enough and are too "liberal" with fee awards compared with judges in other parts of the state. *Id.* at 40-41. As its prime authority for what it evidently regards as poor public policy and practice in Western New York, the Service cites articles from the Rochester, New York morning newspaper.[13]

The "policy considerations" the Service really cares about are the policies and practices underlying administration of estates under New York law, not the illusory impact of "unreasonable" attorneys' fee deductions on the federal treasury. The Service's professed concern that estates should not be charged more than is "reasonable" for an attorney's services may be commendable, but the fact remains that attorney compensation is a *state*, not a federal concern. Any change in the New York Surrogate's Court Procedure Act is a matter for the New York Legislature, not the Internal Revenue Service as *de facto* legislature.

Perhaps, in some instances, the Service has a subtler agenda. As the Court is aware, the case before it does not by any means represent the first time that the IRS has asserted the right to disregard a fee award by a local probate court. *Amicus Curiae* note that there have been "numerous instances where representatives of the Service have threatened the estate's attorney with the disallowance of all or a portion of the attorney's fees unless the attorney concedes, against the interests of the client, other substantive

[13] The impropriety of the Service's attempt to "supplement" the record of this case with unsworn hearsay from an "investigative" reporter seems to require no comment. Furthermore, *none* of the newspaper articles cited by the Service was even published before the district judge issued his decision in January 7, 1987; they obviously had no influence on the Service's decision to issue these summonses. The date of these articles renders them even less meaningful, if possible, in the context of this proceeding, than their source would in any case.

issues." *Amicus Curiae* Brief in Support of Petitioner, p. 19. This sort of conduct is clearly improper under *Powell*, in which this Court indicated that putting pressure on a taxpayer to settle a collateral dispute is an example of a clearly improper purpose for a summons. 379 U.S. at 58, 13 L. Ed. 2d at 119-20.

Whether the Service is genuinely seeking to augment the federal treasury, to compensate for what it sees as shortcomings in local estate administration practices, or to pressure attorneys into concessions in other matters, may be debated. What is beyond debate is that the Service's practice is prejudicial to the interests of estate beneficiaries.[14] The disallowance of part of an attorney's fee by the IRS will not excuse an estate from paying the attorney the amount awarded by the probate court. State law will still obligate the estate to pay the full amount of an administration expense that cannot be fully deducted.[15]

[14] While the Internal Revenue Service cannot be expected to have the interests of estate beneficiaries at heart, the New York Surrogate's Court, by law, occupies a fiduciary relationship toward beneficiaries. The Surrogate is charged with ensuring that estates are not overcharged for administration expenses.

The task of guarding against excessive fees does not, however, fall solely on the Surrogate. Persons interested in an estate have an opportunity under New York law to object to charges against it. In this case a dozen legatees had an opportunity to review the fee request, and each consented in writing — against their interest, if the fee requested was excessive — to payment. J.A. 46. This consent, and the fiduciary role of the Surrogate, distinguish this case from those in *Commissioner v. Estate of Bosch*, 387 U.S. 456, 18 L. Ed. 2d 886 (1967), in which adjudications were obtained in state court solely for the *purpose* of affecting federal estate taxation.

[15] The Service has no legitimate interest in seeking to disallow a deduction for an administrative expense that has actually been paid. As *amicus curiae* has noted, the purpose of allowing deductions in computation of federal estate tax is "to see that the tax is imposed on the net estate, which is really what of value passes from the dead to the living." *Jacobs v. Commissioner*, 34 B.T.A. 594, 597 (1936). See *Amicus Curiae* Brief in Support of Petitioner, p. 10. The Service's position is thus inconsistent with a fundamental philosophical tenet of estate taxation.

The net result would be different for disallowance of other kinds of claims. For example, if the Service disallowed part of an executor's fee — the amount of which is nondiscretionary based on a formula in the New York Surrogate's Court Procedure Act[16] — on the ground of an arithmetical error, the estate would be entitled to have the award reexamined on the basis of clerical error (N.Y. Sur. Ct. Proc. Act § 209) and to recoup the excess. But an estate would have no basis for recouping any part of an attorney's fee simply because the Service had disallowed it in part as excessive. The estate beneficiaries, not the attorney, will ultimately bear the cost of a "second-guess" by the Service.

D. *The Treasury Regulations cannot properly be interpreted to authorize de novo review of attorneys' fee awards*

As authority for a *de novo* review of the Surrogate's fee award, the Service relies heavily on section 20.2053-1(b)(2) of the Treasury Regulations. It is not immediately obvious how this regulation supports the Service's position, since it provides that a decision of a local court (like the New York Surrogate's Court) "as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted." The Service is relying, of all things, on a regulation whose general rule is that local court allowances are conclusive on the Service.

The Service correctly observes that the word "ordinarily" implies that under at least some circumstances a local court decision will not be conclusive on deductibility. These limited circumstances are, however, spelled out in the regulation. Neither of the specified exceptions authorize the Service to routinely second-guess the discretion of the New York Surrogate's Court as to the reasonable amount of an attorney's fee.

[16] N.Y. Sur. Proc. Act § 2307(1).

First, section 20.2053-1(b)(2) states that if a court does not pass upon the facts upon which deductibility depends, its decree need not be followed. But the regulation goes on to indicate, in mandatory terms, that the decree "*will* be accepted" in the case of an "active and genuine contest" or if "the decree was rendered by consent", provided that the consent was "a bona fide recognition of the validity of the claim (and not a mere cloak for a gift)." In the present case, of course, twelve beneficiaries with direct interests in the estate, including an experienced estates lawyer (J.A. 46), did consent — in writing — to the payment of White's fee.[17] This exception thus affords the Service no relief from the general rule of conclusiveness.

The regulation goes on to state that a decree will not be accepted "if it is at variance with the law of the State, as, for example, an allowance made to an executor in excess of that prescribed by statute." The regulation is most obviously aimed at circumstances in which an executor might close his eyes to a dubious "claim" against an estate in order to let property pass to a spurious "claimant" outside the taxable estate, and where a state probate court might perceive no state interest justifying interference.

But this Court is not now presented with such a case; reasonable attorneys' fees are unquestionably a valid charge against an estate under New York law. N.Y. Estates, Powers & Trusts Law § 11-1.1(b)(22). Nor does this case in any way resemble the example given in the regulation, in which the Service can see merely by comparing an executor's allowance with a statutory formula that the allowance exceeds the statutory limit.

[17] There is no suggestion in this case that the petitioner is an object of the decedent's bounty, or that, by consenting to his fee, the beneficiaries intended to make him a gift. If that had been the case, the Service concededly would be entitled to limit the deduction to an amount that actually represents payment for legal services.

Moreover, after the beneficiaries consented and the Surrogate's order was entered, no appeal was filed. The Surrogate's order then became binding on the beneficiaries, and the fee was, beyond doubt, properly paid to petitioner.

The Service argues, however, that its authority under the regulation to reject an allowance "at variance with the law of the State" empowers its auditors to reject an award of fees that is not "reasonable". This argument strains the regulation to the breaking point. *Routine* review of court-ordered fees cannot be reconciled with a general rule that local court decrees will "ordinarily" be accepted.

Equally important, the Service's analysis ignores the fact that there is a specific provision for deductibility of attorneys' fees in the Treasury Regulations that should guide the interpretation of section 20.2053-1(b)(2). Section 20.2053-3(c) provides as follows:

> (c) *Attorney's fees*. (1) The executor or administrator, in filing the estate tax return, may deduct such an amount of attorneys' fees as has actually been paid, or an amount which at the time of filing may reasonably be expected to be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will, nevertheless, be allowed, if the district director is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the deduction is disallowed, in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.

This regulation gives an executor an unqualified right to deduct the full amount of an attorney's fee that has been actually paid. It contains no hint that the Service is free to review, *de novo*, the amount of an attorney's fee that has been awarded and paid. On the contrary, the regulation as a whole, in discussing the deduct-

ibility of fees that are anticipated to be approved and paid, clearly indicates that deductions *are* ultimately to be permitted in accordance with a final order by the probate court. The Service's already strained interpretation of section 20.2053-1(b)(2) is thus inconsistent with the more specific provisions of Section 20.2053-3(c).

The Treasury Regulations should be interpreted so as to be consistent with one another. Even more important, however, is that they be interpreted so as to be consistent with the statute from which they derive their force. A requirement that an administration expense allowable under state law must also be "reasonable" in the view of the Service, in order to be deductible, cannot be inferred from the language of section 2053. The Secretary of the Treasury had no authority to promulgate such a requirement; regulations that fail to reflect the statutory intent as to what should be taxable or what should be deductible are invalid. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 135, 80 L. Ed. 523, 532 (1936); *Koshland v. Helvering*, 298 U.S. 441, 447, 80 L. Ed. 1268, 1273 (1936); *H. Wetter Mfg. Co. v. United States*, 458 F.2d 1033, 1035 (6th Cir. 1972).

The only limitation on the deductibility of estate administration expenses imposed by statute is that they be "allowable by the laws of the jurisdiction . . . under which the estate is being administered." I.R.C. § 2053(a). As interpreted by the Service, the regulation illegally adds to the statute "something which is not there." *United States v. Calamaro*, 354 U.S. 351, 359, 1 L. Ed. 2d 1394, 1399-1400 (1957); *see Dixon v. United States*, 381 U.S. 68, 74-75, 14 L. Ed. 2d 223, 228 (1965). If construed to permit the Service to deny a deduction for an attorney's fee to the extent that the Service considers it "unreasonable", the regulations would afford taxpayers a smaller deduction than permitted by the statute. These considerations suggest that the Court should construe

the Treasury Regulation so as not to conflict with the plain language of the statute.

The Service suggests that the regulation has acquired the weight and force of law because of its long unchallenged history, dating to 1921. Respondent's Brief, pp. 26-29. But while the regulation itself may be entitled to deference, the manner in which the Service now *interprets* the regulation can hardly be considered settled law. There appear to be only three reported cases, including the present one, in which district courts have considered whether the Service is entitled to make an independent review of the reasonable value of attorneys' fees. All three are of relatively recent vintage, and in all three the district courts have rejected the interpretation now advanced by the Service. *See Bank of Nevada v. United States*, 80-2 U.S. Tax Cas. (CCH) ¶ 13,361, p. 85,817 (D. Nev. 1980); *First National Bank v. United States*, 77-2 U.S. Tax Cas. (CCH) ¶ 13,207, p. 88,636 (D. Nev. 1977). None of the other decisions cited by the Service in its Brief (p. 28-29 & n.12) deals with discretionary awards of attorneys' fees; they all deal, instead, with other types of claims or expenses that were not properly chargeable against an estate in the first place.[18]

Properly interpreted, therefore, the Treasury Regulations entitle the Smith estate to deduct the full amount of the attorney's fee awarded by the Surrogate and afford the Service no freedom to question the reasonableness of the award.

[18] The decision in *First National Bank v. United States*, 301 F. Supp. 667 (N.D. Tex. 1969), cited by the respondents in their Brief (p. 29, n.12), did involve an award of attorneys' fees. In that case, however, the portion of the fee award that was disallowed actually represented a separate legal matter, not services to the executor. No parties with adverse interests had consented to the award, and the representatives of the estate had no interest in opposing it since it "was to their interest taxwise that [the deduction for attorneys' fees] be as large as possible." *Id.* at 674.

CONCLUSION

Independent review of estate attorneys' fees on a routine basis, as sought by the Service, inevitably means tension and conflict between state systems of estate administration and the federal government, contrary to the principles of federalism discussed in petitioner's principal brief (pp. 40-44). No encroachment on the prerogatives of the states in the area of decedents' estates is necessary, however, because no federal interest is served by permitting the Service to revisit an attorneys' fee that has already been considered and approved by a state probate court.

The judgment of the court below should be reversed and the judgment of the district court, which denied summons enforcement, should be affirmed.

July 19, 1989

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AMICUS CURIAE

BRIEF

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No. 88-928

IN THE

Supreme Court of the United States

October Term, 1988

JAMES M. WHITE, as attorney for and as the Executor of the Estate of HELEN P. SMITH, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA, and JAMES M. SERLING, Estate Tax Attorney Internal Revenue Service,

Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER SUBMITTED BY THE NEW YORK STATE BAR ASSOCIATION, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE AMERICAN COLLEGE OF PROBATE COUNSEL

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Question Presented for Review

May the Internal Revenue Service summon an attorney's records of services rendered to an estate in order to make an independent factual determination of the reasonableness of the attorney's fee as an administration expense even though the fee has been approved pursuant to applicable state law by the local probate court having jurisdiction?

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***AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER SUBMITTED BY THE NEW YORK STATE BAR ASSOCIATION, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE AMERICAN COLLEGE OF PROBATE COUNSEL**

Interests of the Bar Organizations

The New York State Bar Association, the Association of the Bar of the City of New York and The American College of Probate Counsel ("Bar Organizations") respectfully submit this brief in support of the Petitioner.[1]

The Bar Organizations are interested in this proceeding to preserve an orderly system for the administration and taxation of decedents' estates.

The particular case before this Court is not an isolated case. It is symptomatic of a recent campaign by the Internal Revenue Service ("Service") to challenge the deductibility of attorney's fees as administration expenses. This campaign, if allowed to continue, will disrupt the orderly administration of estates and enmesh the Federal courts unnecessarily and inappropriately in matters primarily of state concern.

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[1] The Bar Organizations have obtained permission from the Solicitor General and from Petitioner to file this *amicus curiae* brief.

The New York State Bar Association is the largest voluntary state bar association in the United States, with roughly 50,000 members. Its policy is to submit *amicus curiae* briefs only in significant appellate cases where authorized by the Executive Committee of the Association.

The Association of the Bar of the City of New York has a membership of approximately 18,000. Its policy also is to file *amicus curiae* briefs only if authorized by the Association's President.

The American College of Probate Counsel is a professional association of lawyers with a current membership consisting of over 2,600 Fellows from throughout the United States who have been elected to membership by their peers on the basis of their professional reputation and their demonstrated exceptional skill and ability in probate, trust or estate planning law, and who have made substantial contributions to these fields through lecturing, writing, teaching and bar activities. The policy of the College is to file *amicus curiae* briefs only on matters "of special significance to the legal profession or the public", as authorized by its Board of Regents.

The judgment of the Second Circuit Court of Appeals has allowed the Service to disregard the decision of the local Surrogate's Court specifically approving the reasonableness of attorney's fees for services to an estate, and to summon records regarding the factual issue decided by the state court. Petitioner has commenced a refund action in the United States District Court on the merits of the deduction. The Government has demanded a jury trial. Thus, the Federal courts are being called upon to relitigate an issue of fact that has already been determined by the appropriate state court in accordance with applicable state law.

Permitting the Service to relitigate such an issue and to summon the lawyer's records in that regard:

1. Imposes an unjustified and costly burden upon the administration of estates;

2. Permits government lawyers to explore the files of their adversaries—lawyers for taxpayers; and

3. Enables government lawyers during the audit process to interject the threat of contesting their adversaries' fees into negotiations on unrelated issues.

Summary of Argument

It is inappropriate for factual determinations by state courts regarding the reasonableness of estate administration expenses to be relitigated in Federal court. Congress did not intend to transfer the resolution of such questions of fact to the Federal courts when it enacted I.R.C. §2053(a), which authorizes a Federal estate tax deduction for administration expenses allowable by state law. Moreover, this Court's holding in *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), does not require that state trial court factual determinations must be appealed to the state's highest court to be determinative for Federal estate tax purposes. The expertise of local probate courts in determining the reasonableness of administration expenses should be respected, not disregarded.

The Bar Organizations respectfully request this Court to hold that the proper scope of inquiry by the Service under *Bosch* with respect to a state court decree approving an administration expense should be no greater than the scope of appellate review under applicable state law. The Service's inquiry was not so limited in this case, and it therefore was not conducted in furtherance of a legitimate purpose as required by *United States v. Powell*, 379 U.S. 48 (1964). In view of the plain language of I.R.C. §2053(a), there was no justification for the Service to inquire further. Its summons enforcement petition should therefore be dismissed.

ARGUMENT

The Internal Revenue Service is Not Entitled to Make a *De Novo* Factual Determination of the Reasonableness of an Administration Expense Approved by the Local Probate Court Having Jurisdiction Pursuant to Criteria Prescribed by the State's Highest Court. The Second Circuit Incorrectly Held to the Contrary.

The Service, which apparently has brought this proceeding as a test case, has asserted a power not authorized by Congress or by this Court: the power to make a *de novo* determination of the reasonableness as an estate administration expense of an attorney's fee which has already been specifically approved by the local Surrogate. The Service did not claim that the Surrogate's decree was the product of fraud or overreaching or was at variance with New York law or would be overturned if appealed.

A. An Administration Expense is Deductible Under I.R.C. §2053(a) if Allowable Under State Law.

I.R.C. §2053(a) provides that the value of the taxable estate for federal estate tax purposes is to be determined by deducting from the value of the gross estate such amounts for administration expenses "as are allowable by the laws of the jurisdiction . . . under which the estate is being administered." The criteria for determining allowable attorney's fees under New York law have been clearly set forth by the New York Court of Appeals in *Matter of Freeman*, 34 N.Y.2d 1 (1974). These factors are: time and labor required; difficulty of the questions presented and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the benefit to the client from the service; community custom and practice regarding estate attorneys' fees; the contingency or certainty of compensation; the results obtained; the responsibility involved; and the amount involved. 34 N.Y.2d at 9. The Surrogate applied the *Freeman* factors in approving the attorney's fee in the present case (J.A. 38). It would be inconsistent with the plain language of §2053(a) to entitle the Service to disregard the Surrogate's decree fixing the amount of an administration expense under applicable state law and make a *de novo* determination as to the allowability of the expense.

From 1916, when Congress first enacted the Federal estate tax, until 1954, a deduction was permitted for administration expenses "allowed" by state law. The statutory language was re-enacted in the Internal Revenue Code of 1954 as Section 2053(a) except that the word "allowed" was changed to "allowable". The purpose of the change was to make it clear that the deduction is permitted in jurisdictions where an estate can be administered and distributed without formal court intervention. There is no indication that the statutory change was intended to take away a deduction for an administration expense in fact allowed under state law. *See* H. R. Rep. No. 1337, 83rd Cong., 2d Sess., *reprinted in* 1954 *U.S. Code Cong & Admin. News,* 4460 and S. Rep. 83rd Cong., 2d Sess., *reprinted in* 1954 *U. S. Code Cong. & Admin. News,* 5117; *Pitner v. United States,* 388 F.2d 651 (5th Cir. 1967); *First National Bank of Nevada v. United States,* 40 A.F.T.R.2d 77-6262 (D. Nev. 1977).

B. This Court's Decision in *Commissioner v. Estate of Bosch* Does Not Apply to Determinations of Fact.

The decision of the Second Circuit misconstrued and misapplied this Court's decision in *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

Bosch involved the validity under New York law of a widow's release of a general power of appointment. This Court held that a decision of a state trial court on an unsettled issue of state law that had not been reviewed by the state's highest court was not determinative of the law of the state for Federal estate tax purposes. *Id.* at 465.

Unlike *Bosch*, the present case does not involve an unsettled issue of state law. What is involved is a determination of *fact*. There has been no contention by the Service that the local Surrogate's Court failed to apply state law correctly.

The Second Circuit erroneously interpreted *Bosch* to mean that the Service need not abide by a factual determination of a state trial court unless the determination has been appealed to and affirmed by the state's highest court.

If this interpretation is allowed to stand, every state court factual determination not appealed to the state's highest court could be relitigated in Federal court even if, as here, the trial court has applied state law as determined by the state's highest court. This interpretation, in addition to fostering duplicative Federal litigation, could cause unnecessary state court appeals in an attempt to avoid such Federal relitigation.

Significantly, the New York Court of Appeals in *Freeman* held that the Surrogate's independent determination of the reasonableness of an attorney's fee was a finding of fact which the Court of Appeals was "powerless" to overturn (34 N.Y.2d at 10).[2] Thus, the New York Court of Appeals has held that the determination of the amount allowed as attorneys' fees is a matter solely within the discretion of the Surrogate's Courts, reviewable only under the same standard as that for a general verdict of a jury. Under *Bosch*, this determination of the state's highest court is binding on the Service.

C. The Service Must Give the Surrogate's Decree the Same Regard as the State's Highest Court Would Give It.

Although the Circuit Court acknowledged that "the IRS is bound by the factors established by the New York Court of Appeals in *Freeman*", it concluded that the Service "is not bound by the Surrogate's application of these factors." (J.A. 77). But as the District Court properly recognized, the Surrogate's exercise of discretion in determining the fee was not reviewable by the state's highest court absent a showing of fraud, overreaching or some other reason to believe that the Surrogate did not properly pass upon the *Freeman* factors (J.A. 59, 60). This is the very test for summons

[2] This holding was in accordance with Article 6, Section 3(a) of the New York Constitution, which provides that the jurisdiction of the Court of Appeals is limited to the review of questions of law, except in limited circumstances not applicable to this case. *See also Matter of Potts*, 213 A.D. 59 at 63 (4th Dep't 1925), *aff'd* 241 N.Y. 593 (1925), noting that "... a presumption exists in favor of the Surrogate's decision [in fixing an attorney's fee], the same as in favor of a general verdict of a jury." *See also Estate of Aaron*, 30 N.Y.2d 718, 720 (1972); *Matter of Spatt*, 32 N.Y.2d 778 (1973).

enforcement suggested by the District Court (J.A. 60-61). **The Service should not have a greater right than a state's highest court to "second guess" a state probate court's factual determination.**

Indeed, the Service is not reviewing the Surrogate's decree at all. While acknowledging (at least on appeal) that it is bound to apply New York state law in determining the allowance of the attorney's fees for estate tax purposes, the Service asserts the right to disregard the determination of the state court having jurisdiction over the estate, and to make its own *de novo* determination. See Point D, *infra*.

Even if the Surrogate's determination were deemed to be a determination of law, *Bosch* would not permit the Service to disregard it totally as the Service has done. To the contrary, *Bosch* requires the Service to give "proper regard" to the Surrogate's determination.[3] "Proper regard" should mean at least the same regard as the New York Court of Appeals would give the Surrogate's decree. There must be an abuse of discretion, non-compliance with New York law or fraud for the state's highest court to disregard and overturn a decree. Under *Bosch*, unless the Service makes such a claim of abuse of discretion, non-compliance or fraud, it should not be permitted to disregard the decree. The Service must accept the decree on the same basis that the state's highest court must accept it.

Thus, the appropriate scope of review for the Service should be the record before the Surrogate, just as it would be for New York's appellate courts. The Service

[3] This Court stated in *Bosch*, "... the State's highest court is the best authority on its own law. If there be no decision by that court then Federal authorities must apply what they find to be the State law after giving 'proper regard' to relevant rulings of other courts of the State." 387 U.S. at 465.

had this record available to it, and there was no basis to inquire further. No decision by the New York Court of Appeals supports a contention by the Service that on the record before the Surrogate in the present case the amount of the fee set by the Surrogate would be changed by a reviewing state court.

If the New York legislature had prescribed the amount of attorney's fees by statute as a percentage of the estate as is done in some states,[4] the Service would evidently have considered itself bound by the statutory amount.[5] Under New York law, attorney's fees are not based entirely on a percentage of the estate but are fixed by the Surrogate's Court in accordance with criteria prescribed by the state's highest court. There is no justification for giving the Service greater latitude to question fees so determined than it has to question fees determined entirely on a percentage basis. It is illogical to permit the Service or Federal courts to make a broader review than the state's highest court could make. *See Bosch, supra*, 387 U.S. at 463; *cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Treas. Reg. §20.2053-1(b)(2) provides:

> *Effect of court decree.* The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends ... If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the

[4] *See, e.g.*, California Probate Code §910.

[5] The Service in this case accepted the amount allowable as the executor's commission which was determined by application of fixed percentages to the value of the estate, under New York Surrogate's Court Procedure Act §2307(1). *Compare Boatmen's First National Bank of Kansas City v. United States*, _______ F. Supp. _______, 89-1 U.S.T.C. 13,795 (W.D. Mo. 1988).

validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant. . . .

The local court in this case *did* pass on the facts upon which deductibility depends, and the Service disregarded both the Surrogate's decree and Treas. Reg. §20.2053-1 (b)(2) and failed to allege any circumstances to justify such disregard. The Service's position has the effect of nullifying this Treasury Regulation.

The Service's new position will be disruptive. It will add to the expense of estate administration and impose duplicative litigation on the courts. As to New York estates, it will require the Service to apply the nine factors listed by the Court of Appeals in the *Freeman* case. If the estate disagrees with the Service's determination, the nine factors will then have to be applied by a Federal District Court, the United States Claims Court or the United States Tax Court. Two courts exercising discretion on the same facts may not arrive at precisely the same result. Regardless of the determination by the Federal Court, the determination of the state court will control the amount of expense actually payable by the estate.[6] The Service has failed to show that the investigation it seeks to conduct has a

[6] This inconsistent result would be contrary to the purpose of the Federal estate tax in allowing deductions, which is ". . . to see that the tax is imposed on the net estate, which is really what of value passes from the dead to the living." *Jacobs v. Commissioner,* 34 B.T.A. 594, 597 (1936). *See also New York Trust Co. v. Eisner,* 256 U.S. 345, 349-50 (1921). As noted in *Hibernia Bank v. United States,* 581 F. 2d 741, 746 (9th Cir. 1978), ". . . fairness dictates that the taxable estate not include assets which will not be available for transfer to the heirs".

legitimate purpose. Regardless of the information it seeks to acquire, the administration expense in question will remain "allowable" under state law. It should therefore remain deductible under Federal law.

In the interest of avoiding undue burden on estates and the Federal court system, this Court should clarify that *Bosch* does not permit the Service to make a *de novo* determination.[7] The specialized expertise of the state probate courts, as recognized by this Court in the so-called "probate exception" in diversity cases,[8] can be relied upon to determine the reasonableness of estate administration expenses,[9] as Congress intended in enacting Section 2053(a). This statute, unlike the marital deduction provision (I.R.C. §2056(a) and (b)(1) and (5)) at issue in *Bosch,* expressly yields to local law the question of the allowability of estate administration expenses.

[7] *See* Verbit, "State Court Decisions in Federal Transfer Tax Litigation: *Bosch* Revisited", 23 *Real Property, Probate and Trust Journal* 407 (Fall 1988), which contends at page 408: "The task of raising federal revenue does not seem to require the creation of a federal law of decedents' estates or property rights to replace existing state law."

[8] This Court established long ago in *Byers v. McAuley,* 149 U.S. 608 (1893) that the Federal courts should not draw to themselves the power of determining all claims against estates. And in *Markham v. Allen,* 326 U.S. 490, at 494 (1946), this Court noted that a Federal court has no jurisdiction to administer an estate. Thus if a local probate court has assumed jurisdiction over an issue involving an estate, the Federal courts will generally not interfere. *See, e.g., Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456 (1939). Indeed, this Court, when first considering the constitutionality of a federal estate tax, conceded that the exclusive power to regulate the devolution of property upon death was vested in the states. *Knowlton v. Moore,* 178 U.S. 41, 58-59 (1899). This view can fairly be considered a part of the historical background of I.R.C. §2053.

[9] *See* Verbit, *supra* at 455-56.

Finally, it should be noted that as the Service as a matter of policy does not appear in state probate court proceedings,[10] the state court decrees are not binding upon the Service under *res judicata* principles. But the Service should not be allowed to force the Federal courts to retry fact questions that both Federal and state law intend should be determined in state courts, simply because the Service chooses not to appear in state courts.

D. There are Substantial Policy Considerations that Favor Leaving to State Courts the Determination of Reasonableness of Estate Administration Expenses.

The Service's position is that it has the power to make a *de novo* determination of the reasonableness of an administration expense approved by a local probate court decree, and in furtherance of that purported power, the Service has issued a broad summons for the attorneys' records in the present case. If the Service's position is correct, then a summons would be proper. But if the claimed power of the Service to redetermine attorney's fees is not justified under I.R.C. §2053(a) or *Bosch*, the power to summon attorney's records for that purpose would also be unjustified and intrusive. It is sound policy to leave to state courts the determination of reasonableness of estate administration expenses. To permit the Service to summon attorney's records in order to make such a determination could lead to a widespread pattern of abuse. As noted in *United States v. Powell*, 379 U.S. 48, at 58 (1964):

> Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to

[10] See Mim. 6134, April 3, 1947, *reprinted in* Federal Taxes (P-H) ¶41,115.

> settle a collateral dispute or for any other purpose reflecting on the good faith of the particular investigation.

Under I.R.C. §7602(a), the Service may issue summonses in connection with tax matters; but to enforce a summons, the Service must show, among other things, that the investigation will be conducted pursuant to a legitimate purpose, and that the inquiry may be relevant to the purpose. *Powell, supra*, 379 U.S. at 57-58. While *Powell* held that "probable cause" to suspect fraud need not be shown, the agent in *Powell* alleged in his affidavit he had "reason to suspect" that the taxpayer had fraudulently falsified his returns. *Id.* at 50. In the present case, the Service did not submit any basis for questioning the Surrogate's determination. Therefore, the Service did not meet its burden of alleging the existence of a legitimate purpose for the issuance of the summonses. *Powell, supra*, 379 U.S. at 57-58.

Moreover, the summonses in this case were overbroad, seeking *all* the taxpayer's records as executor and as attorney for the estate (J.A. 5 and 7). According to I.R.C. §7605(b), "No taxpayer shall be subjected to unnecessary examination or investigations. . . ." It was unnecessary as required by I.R.C. §7605(b) for the Service to see these records to ascertain the correctness of the claimed deduction for the attorney's fee, in light of unquestioned "local law and practice" (*See* Treas. Reg. §20.2053-3(c)(1)) authorizing an attorney's fee of less than an executor's commission (as evidenced by the Surrogate's letter (J.A. 38) presented to the Service before it issued the summonses).[11]

[11] Indeed, several states provide for the attorney's fee to be, at a minimum, equal to an executor's commission. *See, e.g.*, California Probate Code §910.

The Service, rather than reviewing the Surrogate's determination, ignored it,[12] and chose to make a *de novo* determination of the attorney's fee. Initially, the Service based both its demand for information from the taxpayer (*see* J.A. 33-34) and its argument in support of the summons enforcement petition (*see* J.A. 52) on a claim that despite the plain language of Section 2053(a), there is an independent *Federal* standard of reasonableness of administration expenses. The basis of this claim is a *dictum* in *Pitner v. United States*, 388 F.2d 651, 659 (5th Cir. 1967) (later mentioned in a footnote in *Estate of Smith v. Commissioner*, 510 F.2d 479, 482 n. 4 (2d Cir. 1975)) that it is necessary first that the deduction be for an "administration expense" within the meaning of the statute and, second, that the amount sought to be deducted be reasonable under the circumstances. According to *Pitner*, these are both questions of Federal law. *See also Hibernia Bank v. United States*, 581 F.2d 741 (9th Cir. 1978).[13] In the present case, the attorney's

[12] The Government's counsel conceded at the hearing in the District Court: "I'm not here to attack the Monroe County Surrogate in any sense. It may be that in the Surrogate's experience there were things presented to him maybe off the record that justify this fee; or maybe from the record he feels the fee is justified, and I will not take issue with him."

[13] Notably, in *Pitner* the state law failed to create rules to govern the situation one way or the other. There was no necessity for formal administration of the estate under applicable state law. The Court nevertheless allowed a deduction for certain litigation expenses of an unsupervised estate administration. Reasonableness was not the real issue in *Pitner*, and the Court's reference to a Federal standard of reasonableness was expressly limited to situations where for some reason state law fails in adequately representing the interest of the Federal government. *Id.* at 659. The Service made no such contention or showing in the present case.

Likewise, in *Smith* and *Hibernia*, the real issue was not reasonableness, but whether certain expenses other than attorney's fees could properly be characterized as "administration expenses" for the benefit of the estate rather than for the beneficiaries.

fees are unquestionably such "administration expenses" within the meaning of I.R.C. §2053(a). The Service does not contend otherwise. *See* Treas. Reg. §20.2053-3(a) and (c)(1).

The District Court properly held that the state's rather than a Federal standard of reasonableness applies where state law provides an appropriate forum—the Surrogate's Court—to determine the reasonableness of administration expenses under applicable state law. The District Court correctly noted:

> In the instant case the issue is not one of interpreting federal law. It is a case of federal tax authorities refusing to accept the determination of a state court of a matter involved in state administration and clearly dealt with in state law (J.A. 59).

On appeal, the Government seemingly abandoned its claim of a Federal standard of reasonableness, noting for example at page 12 of its reply brief:

> White's books and records were sought *not* because the Government wishes to formulate federal standards of reasonableness of attorney's fees, but because the Government seeks to ascertain whether the Surrogate's fee awards complied with New York law.

However, in National Office Technical Advice Memorandum 8838009, the Service continues to take the same position it took initially in this case: that it may independently determine the reasonableness of claims for administration expenses for purposes of Section 2053, except in the Seventh Circuit where the Service recognizes that the Court of Appeals has ruled there is no such separate Federal standard of

reasonableness.[14] *Estate of Jenner v. Commissioner*, 577 F.2d 1100 (7th Cir. 1978) and *Ballance v. United States*, 347 F.2d 419 (7th Cir. 1965). Technical Advice Memorandum 8838009 states:

> . . . because the present case is situated in the Seventh Circuit, which does not recognize the federal standard described in the *Pitner* case, there could be no basis for limiting the section 2053 deduction for administration expenses in this case on the basis of a federal standard as the expenses were approved by the local probate court under Illinois law.

Contrary to the decision of the Second Circuit, the United States Courts of Appeals for both the Sixth and Seventh Circuits have interpreted I.R.C. §2053(a) to mean that if a state court allows an administration expense to be charged to an estate, the amount of that administration expense is necessarily deductible under Federal estate tax law. *See Estate of Park v. Commissioner*, 475 F.2d 673 (6th Cir. 1973); *Estate of Jenner v. Commissioner, supra*, and *Ballance v. United States, supra*. *See also First National Bank of Nevada v. United States*, 40 A.F.T.R.2d 77-6262 (D. Nev. 1977); *Bank of Nevada v. United States*, 46 A.F.T.R.2d 80-6155 (D. Nev. 1980). *Cf.* Rev. Rul. 69-551, 1969-2 C.B. 177.

The purpose of the summonses in the present case was for the Service to obtain information to enable it to pass on administration expenses under an assumed Federal standard of reasonableness. This was not a legitimate purpose because I.R.C. §2053(a) does not

[14] Although under I.R.C. 6110(j)(3) National Office Technical Advice Memoranda may not be cited or used as precedents, they are often indicative of the Service's position on an issue, and indeed, in this case, Technical Advice Memoranda 8636100 and 8838009 instruct the Service's agents not to challenge the amount of attorney's fees fixed by a local probate court within the Seventh Circuit.

contemplate any such independent Federal standard of reasonableness. This Court should resolve the split in the Circuits in favor of leaving to the state courts the determination of the reasonableness of estate administration expenses, as Congress intended. Section 2053(a) is an "unambiguous direction from Congress" that there is no independent Federal standard of reasonableness with respect to estate administration expenses. *United States v. Bisceglia*, 420 U.S. 141, 150 (1975).[15]

Nor is there any policy justification for an independent Federal standard of reasonableness with respect to estate administration expenses. The beneficiaries who must bear the burden of such expenses and the local probate courts who have the ultimate supervisory power over such expenses have the same interest as claimed by the Service: to limit such expenses to reasonable amounts. State court proceedings concerning attorneys' fees are inherently adversarial, and there is not likely to be collusion between estate attorneys and beneficiaries on fee questions. The application of state law on this issue adequately protects the interest of the Federal Government.

[15] In *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), the Court stated at 504:

> Often Congress does not clearly state in its legislation whether it intends to pre-empt state laws; and in such instances, the courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.

Accord, Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747-48 (1985). *A fortiori*, this Court should sustain local regulation of estate administration expenses where Congress has so clearly so directed, after 200 years of deference to the states' exclusive role in the probate process.

Federal estate tax examiners have recently begun to challenge routinely the deductibility of attorneys' fees as administration expenses.

This audit practice has on occasion involved:

1. Questioning fees that are routine in amount, that have already been passed upon and approved by the local probate court or that clearly comply with local practice guidelines.

2. Demanding "line-by-line" time records from attorneys, and commencing enforcement measures if the records are not supplied voluntarily.

3. Challenging deductibility of fees solely on the basis of the attorney's time even though under controlling state law time is only one of a number of factors to be considered in determining a fee for services to an estate. In New York, there are nine such factors. *Matter of Freeman*, 34 N.Y.2d 1 (1974).

As the District Court below noted, "It appears that the I.R.S. is claiming the right to second guess the decision of the Surrogate on commissions and attorneys' fees under *any* circumstances." (J.A. 54; emphasis in original).

This audit practice raises serious questions of Federalism, persuasively recited in the decision of the District Court (J.A. 55-57).

Moreover, this routine practice of seeking uncontrolled access to attorney's time records can result in an unwarranted intrusion into the areas of attorney work-product, attorney-client privilege and confidential communications between an attorney and client, as this Court recognized in *Upjohn Co. v. United States*, 449 U.S.

383 (1981), and in *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984).[16]

The attorney for the estate and the estate tax attorney from the Service are adversaries. Permitting the Service to force the estate's attorney to disclose a broad range of information with respect to the representation of the estate grants the Service the proverbial "fishing license". It is inappropriate, in an adversarial context, to grant that license. Even if the exact nature of the matters the attorney has worked upon can be withheld from disclosure, the disclosure of the extent of time and attention paid by the attorney, even in broadly described areas, unfairly provides the Service with information it has no right to receive in an adversarial setting. As recognized in *Upjohn, supra* at 398, Federal Rules of Civil Procedure 26(b)(3) requires that "... the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

The Bar Organizations are aware of numerous instances where representatives of the Service have threatened the estate's attorney with the disallowance of all or a portion of the attorney's fees unless the attorney concedes, against the interests of the client, other substantive issues. *See, e.g., Boatmen's First National Bank of Kansas City v. United*

[16] In *Arthur Young*, this Court was careful to distinguish an accountant's tax accrual workpapers from an attorney's records, possibly so protected from disclosure. Moreover, in recognizing the intrusiveness of demands for discovery of an accountant's tax accrual workpapers and yet granting discovery, the Court was influenced by the fact that the Service had tightened its internal requirements for the issuance of summonses seeking such information. By contrast, the Service has recently loosened its restrictions on discovery of information as to estate attorney's fees. *See* Examination Technique Handbook for Estate Tax Examiners 15(52) (12-16-87).

States, _______ F. Supp. _______, 89-1 U.S.T.C. 13,795 (W.D. Mo. 1988). Such a practice places the interests of the attorney in conflict with the interests of the client. Even if the Service's representative does not overtly threaten to disallow the attorney's fee unless there is a concession on other issues, an implied threat of disallowance can permeate the entire audit of the estate tax return.

Finally, the decision of the Circuit Court raises serious questions about the reasonable and uniform administration of the tax law. Even though the Circuit Court directed enforcement of the summonses, it stated, at the end of its decision, that "we . . . acknowledge that one may well wonder whether the IRS . . . is allocating wisely the time and effort of its limited staff . . . ." (J.A. 85).

Determination of the reasonableness of attorney's fees for services to decedents' estates should properly be left to the state court system as Congress intended when it enacted I.R.C. §2053. It does not serve the public interest for the Federal court system to engage in duplicative litigation on such questions, and thereby cause expense and delay in settling estates.

Enforcement of the summons in this case would run counter to important policy considerations relating to Federalism, the attorney-client relationship and allocation of government resources. *See United States v. Euge*, 444 U.S. 707, 711 (1980).

Conclusion

The Service is not justified in issuing a summons to obtain an attorney's records to enable the Service to make a *de novo* factual determination of the reasonableness of an administration expense already approved by the local probate court having jurisdiction pursuant to criteria prescribed by the state's highest court.

The judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding should be reversed, and the judgment of the District Court should be affirmed.

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APPENDIX

Internal Revenue Code
Sec. 2053. Expenses, Indebtedness, and Taxes.

(a) GENERAL RULE.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

Treasury Regulation
§20.2053-3 Deduction for expenses of administering estate—

(a) *In general.* The amounts deductible from a decedent's gross estate as "administration expenses" of the first category (see paragraphs (a) and (c) of §20.2053-1) are limited to such expenses as are actually and necessarily incurred in the administration of the decedent's estate; that is, in the collection of assets, payment of debts, and distribution of property to the persons entitled to it. The expenses contemplated in the law are such only as attend the settlement of an estate and the transfer of the property of the estate to individual beneficiaries or to a trustee, whether the trustee is the executor or some other person. Expenditures not essential to the proper settlement of

the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions. Administration expenses include (1) executor's commissions; (2) attorney's fees; and (3) miscellaneous expenses. Each of these classes is considered separately in paragraphs (b) through (d) of this section.

(c) *Attorney's fees.* (1) The executor or administrator, in filing the estate tax return, may deduct such an amount of attorney's fees as has actually been paid, or an amount which at the time of filing may reasonably be expected to be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will, nevertheless, be allowed, if the district director is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.

Treasury Regulation
§20.2053-1 Deductions for expenses, indebtedness, and taxes; in general

(b) *Provisions applicable to both categories*

(2) *Effect of court decree.* The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed. For example, if the question before the court is whether a claim should be allowed, the decree allowing it will ordinarily be accepted as establishing the validity and

amount of the claim. However, the decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may be rebutted by proof to the contrary. If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant. The decree will not be accepted if it is at variance with the law of the State; as, for example, an allowance made to an executor in excess of that prescribed by statute. On the other hand, a deduction for the amount of a bona fide indebtedness of the decedent, or of a reasonable expense of administration, will not be denied because no court decree has been entered if the amount would be allowable under local law.

Internal Revenue Code
Sec. 2056. Bequests, Etc., To Surviving Spouse.

(a) ALLOWANCE OF MARITAL DEDUCTION.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) LIMITATION IN THE CASE OF LIFE ESTATE OR OTHER TERMINABLE INTEREST.—

(1) GENERAL RULE.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

(5) LIFE ESTATE WITH POWER OF APPOINTMENT IN SURVIVING SPOUSE.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

Internal Revenue Code
Sec. 6110. Public Inspection of Written Determinations.

(j) SPECIAL PROVISIONS.—

(3) PRECEDENTIAL STATUS.—Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.

Internal Revenue Code
Sec. 7602. Examination of Books and Witnesses.

(a) AUTHORITY TO SUMMON, ETC.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Internal Revenue Code
Sec. 7605. Time and Place of Examination.

(b) RESTRICTIONS ON EXAMINATION OF TAXPAYER.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

New York Constitution
Art. 6, §3. Jurisdiction of court of appeals

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

New York Surrogate's Court Procedure Act
§2307. Commissions of fiduciaries other than trustees.

1. On the settlement of the account of any fiduciary other than a trustee the court must allow to him the reasonable and necessary expenses actually paid by him and if he be an attorney of this state and shall have rendered legal services in connection with his official duties, such compensation for his legal services as appear to the court to be just and reasonable and in addition thereto it must allow to the fiduciary for his services as fiduciary, and if there be more than one, apportion among them according to the services rendered by them respectively the following commissions:

(a) For receiving and paying out all sums of money not exceeding $100,000 at the rate of 5 per cent.

(b) For receiving and paying out any additional sums not exceeding $200,000 at the rate of 4 per cent.

(c) For receiving and paying out any additional sums not exceeding $700,000 at the rate of 3 per cent.

(d) For receiving and paying out any additional sums not exceeding $4,000,000 at the rate of 2-1/2 per cent.

(e) For receiving and paying out all sums above $5,000,000 at the rate of 2 per cent.

California Probate Code
§910. Ordinary proceedings; extraordinary services; compensation of paralegals

Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services.

Extraordinary services which the attorney may apply to the court for compensation include those services by any paralegal performing the extraordinary services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.